

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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CAROLINE CASEY AND  
MAGGIE FLAHERTY

v.

NEW HAMPSHIRE SECRETARY OF  
STATE, ET AL.

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\* 19-cv-149-JL  
\* November 21, 2019  
\* 1:30 p.m.  
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TRANSCRIPT OF MOTION HEARING  
AFTERNOON SESSION  
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Plaintiffs: Henry Klementowicz, Esq.  
Gilles R. Bissonnette, Esq.  
Julie A. Ebenstein, Esq.  
Theresa J. Lee, Esq.  
American Civil Liberties Union

For the Defendants: Anthony Galdieri, Esq.  
Samuel R. V. Garland, Esq.  
Seth Michael Zoracki, Esq.  
Office of Attorney General (NH)

William E. Christie, Esq.  
Shaheen & Gordon

Court Reporter: Susan M. Bateman, RPR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603) 225-1453

I N D E X

<u>WITNESS:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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DAVID SCANLAN:

By Mr. Christie		03		12
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By Mr. Zoracki			11	
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1 P R O C E E D I N G S

2 THE COURT: The witness is still under oath.

3 Mr. Christie, you can proceed.

4 MR. CHRISTIE: Thank you, your Honor.

5 CONTINUED CROSS-EXAMINATION

6 BY MR. CHRISTIE:

7 Q. Mr. Scanlan, I think you should have Exhibit  
8 11 in front of you, which is the November 7th letter, if  
9 I turned to the right page during the break.

10 A. Yes.

11 Q. I just want to ask you a couple more questions  
12 about that and then we'll move on.

13 Paragraph one of the letter states, "HB 1264  
14 amended New Hampshire's statutory definitions of  
15 resident and residence. As a result of the amendment,  
16 resident and residence now have the same meanings as  
17 domiciliary and domicile."

18 Did I read that correctly?

19 A. Yes.

20 Q. Okay. But before we took the break we  
21 established that 1264 did not change the definition in  
22 RSA 259:88, right?

23 A. 259:88 reads what it says, but it's a motor  
24 vehicle statute.

25 Q. And the Secretary of State's brief filed with

1 the supreme court did not claim that HB 1264 changed  
2 that definition, right?

3 A. I don't believe it said specifically that 1264  
4 changed the definition of the motor vehicle statute.

5 Q. It says that it only changed the definition of  
6 the resident and residency in chapter 21, right?

7 A. Yes.

8 Q. It does not say it changed the definition in  
9 chapter 259?

10 A. Right.

11 Q. This letter doesn't say that, right?

12 A. This letter does not.

13 Q. Okay. Paragraph 2 of the letter says: As has  
14 been previously communicated in written guidance and at  
15 election official training, HB 1264 made no changes to  
16 New Hampshire's election laws. Did I read that  
17 correctly?

18 A. Yes.

19 Q. All right. And it goes on, but I just want to  
20 focus on, "As has been previously communicated."

21 Do those previous communications include the  
22 September 18th letter that is in evidence as Plaintiffs'  
23 8?

24 A. Yes.

25 Q. Okay. And so the November 7th letter, was

1     that letter intended to rescind the September 18th  
2     letter?

3             A.     No.

4             Q.     Okay.  Then again in paragraph 3 of the  
5     November 7th letter it states:  Any number of actions  
6     can indicate that an individual has established a  
7     particular place as his or her domicile.  Registering to  
8     vote requires that an individual has established a  
9     domicile here and therefore the individual is a New  
10    Hampshire resident.  Correct?

11            A.     Yes.

12            Q.     All right.  But as I think we established  
13    before the break, RSA 259:88 states that if you declare  
14    a residency in another state, RSA 21:6 doesn't apply to  
15    you, right?

16                   MR. ZORACKI:  Objection.  Asks for a legal  
17    conclusion about something in the motor vehicle code.

18                   THE COURT:  I actually thought we established  
19    that before the break.  That's the question, did you  
20    establish before the break that statute 259:88 states  
21    that if you declare a residency in another state the  
22    statute doesn't apply to you?

23                   THE WITNESS:  The statute says what it says.  
24    I don't know that we established anything beyond that.

25                   THE COURT:  All right.

1 Q. The statute 259:88 says --

2 THE COURT: He really isn't equipped to give  
3 you an opinion about that. It says what it says.

4 MR. CHRISTIE: All right. I'll just ask --

5 Q. 259:88 says, "Resident shall mean a resident  
6 of the state as defined in RSA 21:6, except that no  
7 person shall be deemed to be a resident who claims  
8 residence in any other state for any purpose." Correct?

9 A. That's what the statute says.

10 Q. All right. And that language is not  
11 identified here in paragraph 3 of the November 7, 2019,  
12 letter, right?

13 A. That's right.

14 THE COURT: Is it your position, Mr. Christie,  
15 the plaintiffs' position, that that status, claiming  
16 residency in another state, applies to the other lawsuit  
17 you testified earlier?

18 MR. CHRISTIE: Yes.

19 THE COURT: I'm not sure of your position on  
20 that, Mr. Galdieri. It seems like certain of your  
21 questions were to establish that, but I'm not sure what  
22 your position is on the legal import of what you  
23 established.

24 MR. GALDIERI: Well, I don't know how you can  
25 say that that status even exists in the state of

1     Arkansas. We have no idea if somebody can do that in  
2     the state of Arkansas.

3             THE COURT: Can be a resident for, like,  
4     health insurance purposes?

5             MR. GALDIERI: For motor vehicle, but you get  
6     to pick around the country. I want to be a resident  
7     here for voting, a resident here for motor vehicle  
8     purposes, a resident here for health insurance purposes.  
9     I think you ought to know what the law in the other  
10    state is to even know if you could begin to do that.

11            THE COURT: All right. So despite what you  
12    elicited from her during your cross, it is not your  
13    position that she has the status of a person who has  
14    residence in another state because you think that that's  
15    a question that requires more information?

16            MR. GALDIERI: Yes, and she has answered that  
17    she has no idea whether she can have that status with  
18    respect to Arkansas.

19            THE COURT: I see. All right. You can  
20    respond if you want. I wanted to know your positions  
21    and you've told me, but if you want to respond, it's  
22    okay.

23            MR. CHRISTIE: Well, we'll wait for argument.

24            THE COURT: Okay.

25            Q. And then I'd like to go back to Plaintiffs'

1 12, which I think you were shown on your direct  
2 examination. Do you have it?

3 A. Yes.

4 Q. Okay. Great. And this do you understand to  
5 be a printout, strike that, a screenshot of a page from  
6 the Secretary of State's website, at least the first  
7 page of the document?

8 A. Yes, sir.

9 Q. All right. And the date of this -- and it's I  
10 think agreed upon that when you click on the voting as a  
11 college student link, the attached -- the document that  
12 follows the screenshot is the document that at one time  
13 was on the Secretary of State's website?

14 A. Yes.

15 Q. All right. And this document on the footer is  
16 dated November 7, 2018?

17 A. Yes.

18 Q. And on page 4 of the document it says, it has  
19 the question, "Is domicile the same as resident," right?

20 A. Yes.

21 Q. And the answer according to this document was  
22 that domicile and resident have different meanings,  
23 right?

24 A. Yes.

25 Q. And that is the document that was on the



1 Secretary of State's website up until last week?

2 A. Yes.

3 Q. So if a student trying to figure out whether  
4 the definition of resident and domicile checked the  
5 Secretary of State's website as late as last week, it  
6 would have been told by the Secretary of State's Office  
7 that the definition of domicile and resident are  
8 different, right?

9 A. They would have seen this on the page.

10 Q. This is the information that would have been  
11 published to them by the Secretary of State's Office,  
12 right?

13 A. This would have been on the website of the  
14 Secretary of State's Office.

15 Q. All right. And that's the same information  
16 that would have been published to an election law  
17 official who looked on the website for the answer to  
18 this question, right?

19 A. That's what they would have seen if they  
20 looked at this page.

21 Q. And it is the same answer that would have been  
22 published to anyone who accessed the New Hampshire  
23 Secretary of State's website, that resident and domicile  
24 have different definitions?

25 A. If they looked at this page up until a week

1     ago.

2             Q.     Right.  And Exhibit 13 was the --

3                   THE COURT:  What do you mean up until a week  
4     ago, until the letter was posted?

5                   THE WITNESS:  Then that page on the website  
6     was changed.

7                   THE COURT:  That was a week ago or two weeks  
8     ago?

9                   THE WITNESS:  It was about a week ago.

10                  THE COURT:  Okay.

11                 Q.     It was in response to the filings in this  
12     lawsuit, right?

13                 A.     It was changed as a result of this process.

14                 Q.     It was changed so you could come here today  
15     and testify that that language is no longer on your  
16     website?

17                 A.     I don't know that that's the case.  It was  
18     changed within the last week.

19                 Q.     Right.  But prior to last week that's the  
20     language that was on there, right?

21                 A.     Yes.

22                 Q.     And then on Exhibit 13 is the document that's  
23     currently on the website, right?

24                 A.     Yes.

25                 Q.     And the date of that document in the footer is

1 July 2019?

2 A. Yes.

3 Q. When was this document created?

4 A. I don't know.

5 Q. And the first paragraph on the document says,  
6 "This guidance was revised on November 7, 2018." Do you  
7 see that?

8 A. I see that.

9 Q. But that's not accurate, right?

10 A. This guidance would have been revised within  
11 the last week and that's probably the date that should  
12 be on there.

13 Q. Okay. Thank you.

14 THE COURT: Redirect?

15 REDIRECT EXAMINATION

16 BY MR. ZORACKI:

17 Q. Deputy Scanlan, there were some questions  
18 about Ann Shump on cross. Who is Ann Shump?

19 A. Ann Shump is a supervisor of the checklist in  
20 the town of Durham.

21 Q. Okay. And has Ann Shump ever called you to  
22 ask any questions or express any confusion about HB  
23 1264?

24 A. Not that I can recall.

25 Q. Does the Secretary of State's Office provide

1 guidance to local election officials on how the state  
2 motor vehicle laws might impact New Hampshire voters?

3 A. No.

4 Q. Why not?

5 A. Because we're not familiar with other  
6 statutes. We're responsible for administering the  
7 election laws, not the motor vehicle laws.

8 MR. ZORACKI: Thank you. Nothing further,  
9 your Honor.

10 MR. CHRISTIE: Just one follow-up question,  
11 Judge.

12 RECROSS-EXAMINATION

13 BY MR. CHRISTIE:

14 Q. Do you know if Ms. Shump contacted Bud Fitch  
15 at your office regarding confusion?

16 A. I don't know if she did or not.

17 Q. If she said that in her declaration, would you  
18 have any reason to dispute that?

19 A. No.

20 MR. CHRISTIE: Okay. Thank you.

21 THE COURT: Have you or anyone else in your  
22 office had any discussions with election officials in  
23 the city of Keene regarding this change in the law that  
24 we're here talking about today?

25 THE WITNESS: Outside of our training

1 sessions, and usually we go to the Keene area to do one,  
2 no, we haven't had any one-on-one discussions with the  
3 city of Keene.

4 THE COURT: Well, I don't know if it needs to  
5 be one-on-one. I'm asking about the type of confusion  
6 that was expressed by the clerk from the Town of  
7 Hanover, have you had any -- and I'm asking, you know,  
8 any similar interactions with them where they inquired  
9 about confusion surrounding this issue?

10 THE WITNESS: No.

11 THE COURT: What about the Town of Plymouth?

12 THE WITNESS: No.

13 THE COURT: No? All right. I think there's  
14 4,000 plus college students in Plymouth. There's 3,000  
15 plus in Keene. I'm curious about that. Why the  
16 emphasis on UNH and Dartmouth?

17 MR. CHRISTIE: Because the evidence, I think  
18 it's in the record, is because that's where the  
19 overwhelming same-day registrations take place is in  
20 Hanover and Durham. It's overwhelming.

21 MR. KLEMENTOWICZ: Not only that, but I think  
22 there are higher rates of out-of-state usage of ID in  
23 those particular colleges versus Keene and --

24 THE COURT: That also makes sense. Many more  
25 in-state students at Keene and Plymouth.

1 MR. GALDIERI: And, your Honor, I would just  
2 add to that discussion that I believe Clerk McClain and  
3 Supervisor Shump probably don't support this piece of  
4 legislation.

5 THE COURT: So you think it's motivated  
6 confusion?

7 MR. GALDIERI: It could be.

8 THE COURT: Okay.

9 MR. CHRISTIE: Well, I would suggest that Mr.  
10 Scanlan supports the legislation so would have an  
11 incentive to minimize confusion if we're going to get  
12 into that.

13 THE COURT: Okay. All right then. Thank you.  
14 All right. I don't want to take a lunch break  
15 right after we took a break, so let's keep on going.

16 Argument. It's your motion.

17 MR. KLEMENTOWICZ: Thank you, your Honor.

18 Good afternoon, your Honor.

19 So we're here on our motion for preliminary  
20 injunction limited to Count 1 of our complaint, the  
21 Anderson-Burdick framework, specifically as it relates  
22 to the issue of confusion and the burden that that  
23 imposes on voters.

24 First, the standard. Anderson-Burdick is a  
25 sliding scale. So the first part of the inquiry is you

1 look at the character and magnitude of the burden and  
2 then you evaluate what level of scrutiny must be applied  
3 to the law.

4 THE COURT: Yeah.

5 MR. KLEMENTOWICZ: So first, if it's an  
6 unreasonable and discriminatory -- I'm sorry --  
7 unreasonable or discriminatory law, it's -- let me start  
8 that again. I'm sorry.

9 If it's a reasonable and nondiscriminatory  
10 law, you go with the lowest level of balance and what  
11 the Crawford plurality described as: However slight a  
12 burden may appear, it must be justified by relevant and  
13 legitimate state interest sufficiently weighty to  
14 justify the limitations. That's at the low end, the  
15 sufficiently weighty language.

16 At the high end is strict scrutiny where the  
17 burden is severe. And then in the middle if it's less  
18 than severe but higher than reasonable and  
19 nondiscriminatory, there's a sliding scale analysis.  
20 The Guare Court has used intermediate scrutiny. Other  
21 courts have come to slightly --

22 THE COURT: If I understood your briefing  
23 correctly, the level of burden -- the burdensomeness  
24 dictates the level of scrutiny.

25 MR. KLEMENTOWICZ: Yes.

1 THE COURT: Okay. It just sounds like what  
2 you're advancing is sort of circular. If it's  
3 discriminatory -- that's not the analysis. The analysis  
4 is the level of burden. So we're talking about the  
5 burden on the right to vote, and the burden you're  
6 talking about is confusion.

7 MR. KLEMENTOWICZ: Yes, but if you look at the  
8 language from Anderson-Burdick that justifies the lowest  
9 level of scrutiny, it's to reasonable and  
10 nondiscriminatory burdens.

11 So I think that there's a lot of support, the  
12 idea that a discriminatory law requires higher scrutiny.  
13 So for that I refer the Court to -- there's Obama for  
14 America versus --

15 THE COURT: Okay.

16 MR. KLEMENTOWICZ: Obama for America versus  
17 Husted considers a discriminatory impact on military or  
18 nonmilitary people for heightened scrutiny.

19 There's a new case from the Northern District  
20 of Florida from November 15th. That's Jacobson versus  
21 Lee, a 2019 Northern District of Florida, that notes  
22 higher levels of scrutiny because the law in question  
23 targeted Democrats.

24 There was the League of Women Voters of  
25 Florida versus Detzner.



1                   Libertarian Party of New Hampshire versus  
2   Gardner, which was a case from Judge Barbadoro from 2014  
3   --

4                   THE COURT:   Yeah.

5                   MR. KLEMENTOWICZ:  -- where he wrote that, "To  
6   avoid heightened scrutiny, a law must be  
7   nondiscriminatory and reasonable."

8                   So that's the first step of the inquiry.  So  
9   one looks at the burdens.

10                  Let me just state at the outset that per an  
11   agreement that we have with the defendants, we're not  
12   relying on the declaration from Ms. Corriveau in this  
13   case.  We're relying on the other six affidavits from  
14   the individual voters plus Michael Herron's, plus  
15   Elizabeth Wester, plus Ann Shump, plus Elizabeth  
16   McClain.

17                  So at the outset, I think if the Court finds  
18   that RSA 259:88 means what it says that it means, that  
19   what we advance that it means, we're immediately in the  
20   land implicated by Guare because the state is advising  
21   people of the wrong law.  So RSA 259:88 says that the  
22   definition for motor vehicle purposes of resident is the  
23   general definition of residence except that a person --  
24   except it does not include people who may claim  
25   residence in another state for another purpose.

1           That section, as the except clause, as is  
2     consistent with New Hampshire Supreme Court's  
3     well-settled principles of statutory construction, has  
4     to mean something, and what it means is what it says.  
5     If you claim residency in another state for any other  
6     purpose, you're not required -- you're not a resident  
7     under the motor vehicle code.

8           If that's what the Court thinks is likely to  
9     happen when the case gets certified to the New Hampshire  
10    Supreme Court, then the state's guidance, the September  
11    18th letter, the November 7th letter, all the  
12    communications that have been coming out of the  
13    Secretary of State's Office are wrong because as was  
14    identified on cross-examination of Deputy Secretary of  
15    State Scanlan, and as identified just from looking at  
16    the documents, they don't mention RSA 259:88. They  
17    don't inform people that if they claim residency in  
18    another state for another purpose they're not obligated  
19    to get a New Hampshire driver's license, and that's  
20    precisely the same confusion that was examined by the  
21    Court in Guare.

22           THE COURT: So I would say it arguably  
23    supports your confusion argument, arguably undermines  
24    your investigation of a fee burden argument because if  
25    it identifies the college students, many of them won't

1 be required to pay these investigation fees.

2 Do you follow what I'm saying?

3 MR. KLEMENTOWICZ: I do follow what you're  
4 saying, and I don't think that's wrong. Obviously the  
5 only question before the Court right now is the  
6 confusion and that's why, because it depends on what the  
7 law means.

8 THE COURT: Okay.

9 MR. KLEMENTOWICZ: So the supreme court in  
10 Guare examined a legal background in which the  
11 registration form told essentially people who were  
12 registering to vote that they had to comply with the  
13 obligations of residency, which includes the obligation  
14 to register a car or a driver's license, and the reason  
15 that that was struck down by the Guare Court is because  
16 it was confusing and inaccurate. It inaccurately stated  
17 the law. It told voters the wrong thing. The Court  
18 applied intermediate scrutiny and found the burdens were  
19 not sufficiently supported by state interests, and  
20 that's exactly the case here if your Honor agrees with  
21 us about what 259:88 means.

22 That's consistent with the legislative history  
23 that we've provided the Court which shows that this  
24 language was requested by the DMV in 1985 to address the  
25 problems of people registering their car in New

1 Hampshire but claiming residence in multiple states.

2 By the way, you know, the language says that  
3 it accepts people who claim residency in another state.  
4 It doesn't say people who are residents in another  
5 state. It's a little bit more permissive. And I think  
6 that that is probably built in to account for the  
7 situation where a person may think that they're a  
8 resident of Arkansas for motor vehicle purposes but  
9 maybe they're not.

10 And that's also consistent, by the way, with  
11 the Colly decision, which we attached to our pleadings,  
12 which was one of the cases -- the case that we were able  
13 to locate to date where a judge actually examined the  
14 meaning of RSA 259:88 in a motor vehicle prosecution  
15 context.

16 THE COURT: That was interesting, yeah.

17 MR. KLEMENTOWICZ: Yeah, specifically pointed  
18 out the statute and used it in acquitting the defendant,  
19 because in that case I guess, you know, there was a  
20 reasonable doubt whether that person believed that they  
21 had residence in another state.

22 THE COURT: Yeah.

23 MR. KLEMENTOWICZ: By the way, and I'll get to  
24 this later in our argument, but if you pull at the  
25 thread of RSA 259:88, not only are you making the

1 confusion more and more evident, but you're also  
2 weakening the commensurate state interest because if RSA  
3 259:88 doesn't actually require people to get driver's  
4 licenses, then it doesn't really advance any of the  
5 interests that the state says that it does. And so all  
6 it's doing is confusing people through its operation.

7 In addition, the guidance that the state has  
8 provided to local election officials is  
9 self-contradictory and unclear. So obviously it admits  
10 mention of a key residency definition that's central to  
11 the analysis. And part of the reason why the Court is  
12 going to certify this case over to the New Hampshire  
13 Supreme Court is to certify -- I'm sorry -- to get the  
14 complete resolution of the meaning of that exact  
15 statute. And I submit that if this Court feels the  
16 question is sufficiently weighty and open that the Court  
17 can't resolve it, how is an individual voter supposed  
18 to?

19 So in addition to that confusion, the letters  
20 are from --

21 THE COURT: It's not that I don't think the  
22 Court could resolve it. Mr. Galdieri has been telling  
23 me in his brief, and all along, it's a simple question  
24 that the Court can easily -- it's not that I don't think  
25 the Court could resolve it. It's just not this Court's

1 function to resolve it. It's the New Hampshire Court's  
2 function to resolve that.

3 I differ with Mr. Galdieri that it's as simple  
4 as he points out, but I do understand his point. Our  
5 Court doesn't routinely sort of predict what the New  
6 Hampshire Supreme Court will do with an issue. I'm not  
7 sure this is the appropriate situation for that, but  
8 it's just not that I think it's so difficult, it's that  
9 I think it's better decided by the highest court in the  
10 jurisdiction to interpret the New Hampshire law.

11 Anyway, it's not really germane to your point,  
12 I'm sorry for interrupting, but your point is well taken  
13 about lay people trying to interpret.

14 MR. KLEMENTOWICZ: There are other problems  
15 with the September 18th and November 7th letters. For  
16 example, they are contradictory with each other in at  
17 least three ways that I can count. The first is that  
18 the September 18th letter instructs local election  
19 officials that election officials are neither authorized  
20 nor trained to provide legal guidance on laws other than  
21 election laws, which is essentially guidance to people  
22 like Clerk McClain saying, don't answer the question  
23 when asked, and the November 7, 2019, letter is silent.  
24 And I think its silence is actually deafening because  
25 some local election officials may interpret that as, I'm

1 allowed to answer the question.

2 Betsy McClain testified that she thinks she  
3 understands whether people are required to get driver's  
4 licenses if they register to vote, but I'm not sure if  
5 it was clear from her testimony whether she understands  
6 if she's allowed to provide that guidance.

7 THE COURT: I'm not sure I agree with you  
8 that's contradictory, but I see your point.

9 MR. KLEMENTOWICZ: Or inconsistent maybe is a  
10 better word.

11 Second, the guidance attached to the September  
12 18th letter writes that domicile under RSA 654:1 and the  
13 definition of resident under RSA 21:6 may be equivalent,  
14 whereas the November 7th letter says that as a result of  
15 the amendment, resident and residence now have the same  
16 meanings as domicile and domiciliary. On one hand  
17 there's wiggle room, it's unclear whether the two  
18 actually are the same, and in another letter they're  
19 explicitly linked together.

20 The same attachment says in the last sentence  
21 that individual circumstances may vary and this  
22 obligation should be determined on a case-by-case basis.  
23 There's no such language in the November 7th letter, and  
24 that's an important distinction. It seems like we're  
25 quibbling over words, but I don't think that we are

1 because there's presumably a category of people who are  
2 unclear whether they need to get New Hampshire driver's  
3 licenses because they've registered to vote.

4 And if they look at the November 7th guidance  
5 they say, well, definitely I do, maybe, because now one  
6 who has, you know, establishes domicile has established  
7 residence, and registering to vote requires that a  
8 person is now a resident and obligations for new  
9 residents have not changed.

10 Under the motor vehicle code an individual has  
11 60 days upon establishing residence to obtain a New  
12 Hampshire driver's license if they drive in the state  
13 and to register a vehicle if they own a vehicle in the  
14 state.

15 On the other hand, if they look at the  
16 September 18th guidance they think, well, maybe I don't,  
17 because individual circumstances may vary and this  
18 obligation should be determined on a case-by-case basis.  
19 It's not clear who's making that determination, what  
20 those -- how individual circumstances could vary,  
21 whether there are voters who don't need to get a  
22 driver's license because they voted. There's a category  
23 of voters who do not under the September 18th letter and  
24 who do under the November 7th letter.

25 In addition, the November 7th letter was, as



1 the Court noted, addressed and sent after our  
2 preliminary injunction filings came in. We don't  
3 exactly know what its implication has been everywhere,  
4 but as your Honor has previously said, you have no  
5 problem finding there was at least a period of confusion  
6 when people were operating under the September 18th  
7 letter. We don't know to what extent that bell can be  
8 unrung by the November 7th letter, there hasn't been  
9 time to do that kind of investigation, but I submit that  
10 even up until a week ago --

11 THE COURT: That doesn't seem like that's  
12 something that required research or -- I mean, if it's  
13 clarified to a reasonable degree of certainty that a  
14 speaker of the English language can understand, it's  
15 been clarified, right?

16 MR. KLEMENTOWICZ: I don't think so, because I  
17 think that if someone reads the September 18th letter  
18 and comes away with one opinion, they may never see the  
19 new letter. There could be a category of people who  
20 interacted -- who looked at the website, the Secretary  
21 of State's website that said domicile and residence are  
22 different, up until apparently a week ago, and who came  
23 away with information that would be totally different  
24 from what it is if they were to check now.

25 We can't assume that everyone who saw, who got

1 guidance from the Secretary of State's Office or a local  
2 election official who was relying on that guidance has  
3 now come into interaction with the November 7th letter.

4 THE COURT: Probably hasn't, but that's not  
5 the question. The question is whether they will by the  
6 presidential primary, right? It's not really whether  
7 they have been disabused of their misapprehension as of  
8 now; it's whether it can be by the election.

9 MR. KLEMENTOWICZ: Well, I think the question  
10 is have they been confounded and has that infringed upon  
11 their right to vote in any way. So if they saw the  
12 letter --

13 THE COURT: I'm supposed to find that there's  
14 been enough people confounded by this as of right now to  
15 grant you an injunction?

16 MR. KLEMENTOWICZ: So we've submitted -- you  
17 look at the Anderson-Burdick framework, and the  
18 question is how much is the --

19 THE COURT: Everybody you've given me an  
20 affidavit for is registered to vote. They're all going  
21 to vote.

22 MR. KLEMENTOWICZ: Mary Catherine Suskie  
23 testified that she tried to unregister to vote when she  
24 found out about the law.

25 THE COURT: And she testified that she's going

1 to vote in Arkansas. She's going to vote.

2 MR. KLEMENTOWICZ: She has a right to vote in  
3 New Hampshire, right, under --

4 THE COURT: Well, says you. Actually, yeah,  
5 says the law, right? The domicile, that's a good point.

6 MR. KLEMENTOWICZ: Right. Students have a  
7 right to vote if they meet the qualifications for  
8 domicile in New Hampshire under RSA 654:1 1(a) I think  
9 it is. And if she is discouraged from exercising that  
10 right to vote in New Hampshire that she otherwise wanted  
11 to by this law, that's because of the burden. She  
12 testified she would like to. She's not sure if she  
13 could.

14 THE COURT: I mean, it's not that I think  
15 that's a crazy position. It's just that -- is there  
16 authority for that proposition that the right to vote,  
17 you know, if one -- the right to vote in one  
18 jurisdiction over another, that that's what the right  
19 stands for?

20 If someone says, there's a question about  
21 whether I can vote in New Hampshire, but I'm certainly  
22 going to vote somewhere else, that's still a burden on  
23 the right to vote? Is there authority for that  
24 proposition?

25 MR. KLEMENTOWICZ: So as I'm thinking about

1 that, I think the answer is, it happens all the time in  
2 voting rights cases where a legal situation may prevent  
3 someone from voting in the state where they live.

4 For example, in a felony disenfranchisement  
5 case, people who are disenfranchised in one state if  
6 they move to another state may not be disenfranchised.

7 It's a bad example as I'm saying it because  
8 there are special protections under the Constitution for  
9 disenfranchising felons, but once they can prevent  
10 someone from voting in that state and they can go to  
11 another state and vote, their rights have still been  
12 infringed.

13 THE COURT: Yeah, but this isn't going to  
14 another state and vote. This is just get an absentee  
15 ballot and vote. It's just like --

16 MR. KLEMENTOWICZ: Well, you can vote for  
17 different offices. They have a different governor in  
18 Arkansas. They have different senators. They have  
19 different representatives. She testified that she lives  
20 in New Hampshire, that that's her community. She  
21 presumably drives a motor vehicle in Concord. She uses  
22 police department services, fire department services.  
23 Presumably she wants to have a say in the local  
24 governance in New Hampshire in addition to voting for  
25 president, and voting for president is the only thing

1 that's equivalent whether she votes in Arkansas or she  
2 votes here. If she wants to have a say in who her state  
3 rep is, voting in Arkansas doesn't help. She's not  
4 being operated on by their laws in the same way, just  
5 for motor vehicle purposes.

6 So I do think that it is a burden, because  
7 she's potentially lost the ability to vote for her  
8 representation in Concord.

9 THE COURT: I'm not sure where we are in your  
10 analysis. Are we still in what level of scrutiny or are  
11 we in this doesn't survive scrutiny? I think that's  
12 where we are, right?

13 MR. KLEMENTOWICZ: So I think we're in what's  
14 the magnitude of the burden. So the magnitude of the  
15 burden is, number one, if the state is wrong about what  
16 RSA 259:88 means, the burden is that they've been  
17 inaccurately telling people the law, that's precisely  
18 the situation in Guare, intermediate scrutiny, it won't  
19 survive.

20 Even if they're not wrong, the law -- the  
21 guidance that they've submitted has been at least  
22 somewhat inconsistent as to whether local election  
23 officials are allowed to tell people about the  
24 obligation from registering to vote that ties to these  
25 motor vehicle obligations, and the witnesses who

1 submitted testimony in this case, which by the way  
2 includes witnesses who are election officials in the  
3 state of New Hampshire that have the two biggest, I  
4 think, universities in the state of New Hampshire,  
5 probably the highest rates -- I don't know this --  
6 probably the highest rates of out-of-state ID usage in  
7 the state, or close to, top ten at least, probably some  
8 of the highest rates of same-day voter registration.  
9 They've testified that people are going to be confused  
10 and potentially discouraged from voting because they're  
11 unclear about the obligations that --

12 THE COURT: Well, what's the remedy for that?  
13 What's the remedy for confusion?

14 MR. KLEMENTOWICZ: The remedy for confusion in  
15 this case is an order from the Secretary of State's  
16 Office and to the Attorney General's Office saying: You  
17 cannot use evidence of voter history or voter  
18 registration to prosecute people for failing to update  
19 their license --

20 THE COURT: That's not the remedy for  
21 confusion. That's not what we're here litigating about.  
22 The remedy for confusion is information, clarification,  
23 right?

24 MR. KLEMENTOWICZ: And then posting that order  
25 on the Secretary of State's website, distributing it to

1 the public.

2 THE COURT: Which they did. I considered  
3 ordering them to do that once I read your briefing,  
4 ordering them to clarify it and post it, but they did  
5 it. They did it the day after your papers were due,  
6 which was irksome, but they did it and -- you're not  
7 just asking for clarification. You're asking for  
8 clarification under the interpretation of the law that  
9 you -- also eliminating what you say is the other burden  
10 in the case that isn't part of this injunction  
11 proceeding. I mean, the remedy for confusion is  
12 clarification, and I don't know how it's anything else.  
13 How could it be anything else?

14 MR. KLEMENTOWICZ: So the remedy for confusion  
15 is to clarify what people's obligations are. Right now  
16 -- first of all, people's obligations under the law are  
17 completely unclear, because under RSA 259:88 if they  
18 claim residency for any other purpose in any other  
19 state, they're not obligated to get New Hampshire  
20 driver's licenses, and they've been told that they are.

21 So, sure, the state posted on their website a  
22 letter that gives people wrong advice and that is  
23 inconsistent with previous guidance that they have  
24 disseminated.

25 So it's also important to remember that the

1 remedy for confusion, just clarifying the law is not  
2 enough, because you also have to remind people that they  
3 can't have their confusion used against them.

4 THE COURT: But let me look at this letter  
5 again. The clarifying letter, the November 7th letter.  
6 That's Plaintiffs' Exhibit 11, right?

7 MR. KLEMENTOWICZ: Yes.

8 THE COURT: I think I'm persuaded that the  
9 state has clarified the meaning of the legislative  
10 change, but your point is that, well, they haven't  
11 clarified the meaning of, what is it, 259:88 and its  
12 effect, right?

13 MR. KLEMENTOWICZ: Right.

14 THE COURT: That's not addressed here in this  
15 November 7th letter, right?

16 MR. KLEMENTOWICZ: It's not mentioned at all  
17 in this November 7 letter.

18 THE COURT: Okay. And you just said a minute  
19 ago that's an incorrect statement of the law. You said  
20 that's just wrong advice.

21 MR. KLEMENTOWICZ: Yes.

22 THE COURT: Well, isn't your remedy there in  
23 state court? Why is your remedy -- if you need a  
24 clarification on that, why is your remedy in U.S.  
25 District Court?



1           MR. KLEMENTOWICZ: Because if they're telling  
2 people the wrong law, they're violating the  
3 Anderson-Burdick framework, because the Anderson-Burdick  
4 framework -- okay. You start with the burdens and you  
5 balance them against the state interests, which by the  
6 way, there's no evidence that supports any of the  
7 state's interests. Even if the burden is minimal as the  
8 Court is suggesting, they still have to -- well,  
9 actually, I don't think you are suggesting that, but  
10 even if the burden were minimal, they still have to  
11 support it by sufficient state interests. That's what  
12 the Crawford majority says.

13           So the Anderson-Burdick framework provides a  
14 federal court vehicle under the First Amendment and the  
15 Fourteenth Amendment for a plaintiff to challenge any  
16 burden on the right to vote because it's interfering  
17 with the rights protected by the United States  
18 Constitution, right? So to the extent that it does,  
19 you're entitled to a federal remedy. And an inaccurate  
20 statement of the law, as the Guare Court found, is an  
21 inaccurate statement of the law, which is confusion and  
22 a burden on the right to vote that's not supportable by  
23 any state interest because --

24           THE COURT: What case found?

25           MR. KLEMENTOWICZ: Guare versus State.

1 THE COURT: Guare?

2 MR. KLEMENTOWICZ: Right. There's other cases  
3 that stand for the proposition that confusion on the  
4 right to vote is an Anderson-Burdick violation under the  
5 First and Fourteenth Amendment.

6 THE COURT: Yeah, I haven't found any cases  
7 that describe the type of confusion that you're  
8 describing. They've all been about confusing ballots or  
9 like specific voter information, logistics. I haven't  
10 found that -- either the ones you cited or anywhere else  
11 suggesting that a statutory regime that one might deem  
12 confusing is a burden on the right to vote.

13 MR. KLEMENTOWICZ: I think the question is,  
14 what's the context in which the confusion arises.  
15 Because if it arises in the context of registering to  
16 vote, it can be a burden on the right to vote.

17 So in this case what the evidence --

18 THE COURT: Say that again. What?

19 MR. KLEMENTOWICZ: If the confusion arises in  
20 the context of someone trying to register to vote or  
21 someone trying to vote, it can be a burden on the right  
22 to vote, and that's what the evidence establishes  
23 happened in this case. The affiants who submitted  
24 testimony said that they were confused about whether  
25 registering to vote creates these other obligations.

1           THE COURT: That's an interesting contextual  
2 argument. Yeah, I get it. That's been your position  
3 throughout this litigation.

4           The problem is though -- I mean, I'm not aware  
5 of the context test. I've seen the cases that you  
6 cited. The cases that you cited talk about malice.  
7 They don't talk about someone who says, I don't  
8 understand the law of domicile, or residency in this  
9 state, and therefore I'm confused.

10           I haven't seen authority for that proposition.  
11 And I guess your answer is, and I don't mean to be  
12 dismissive of it, is basically if it arises in the  
13 context of registering to vote, that's a burden.

14           MR. KLEMENTOWICZ: That's part of it. The  
15 other case is the Guare case which is, again, precisely  
16 the same situation here where people are being told --  
17 now, albeit it's on a voter registration form, but the  
18 confusion from the inaccurate statement of law was what  
19 the motor vehicle obligations that arose from a decision  
20 to register to vote were.

21           So that's the exact same type of confusion  
22 that we're talking about. Obviously that's a state  
23 court, but they said when the legislature or a form or  
24 the government is inaccurately telling people what the  
25 obligations that are going to flow from registering to

1 vote are, even if those obligations are motor vehicle  
2 obligations, that's still an Anderson-Burdick violation.

3 So I think, number one, there's an evidentiary  
4 showing. The town clerk in Hanover, the chair of the  
5 supervisors of the checklist in Durham, both testified  
6 that these questions are going to arise and they're  
7 going to arise in the context of voting.

8 Ann Shump said -- so she writes, "Based upon  
9 my professional experience, I believe that this law will  
10 cause questions and confusion at the polls on election  
11 day and could cause qualified voters to refrain from  
12 voting in Durham. I also believe that these extra  
13 questions I expect about motor vehicle requirements will  
14 cause delays at the registration tables at the polling  
15 place and in turn longer registration lines."

16 If anyone is in a position to know how people  
17 in these college towns are going to react to this law,  
18 it's local election officials from the towns with the  
19 highest number of college students. So local election  
20 officials who work in Hanover and Durham are the ones in  
21 a position to know how potential voters, especially  
22 college students, are going to react to this law.

23 In addition, I think it's clear from HB 1264  
24 that the only thing that it does, if it does anything at  
25 all, is tie the act of registering to vote with these

1 potential DMV obligations, because it merely serves to  
2 align the definition of domicile with residency under  
3 RSA 21:6 and 21:6-a, and the only thing that that does  
4 is tie these obligations together. It is a voting law.  
5 What the law did was make these obligations spring from  
6 the decision to vote.

7           So we've talked a little bit about the  
8 confusion. We've talked about how it's inconsistent  
9 with RSA 259:88, how the state's argument would make the  
10 except clause -- the state's interpretation of RSA  
11 259:88 would make the except clause surplusage and in  
12 contradiction of state court canons of statutory  
13 construction and the legislative history.

14           We've talked a little bit about the  
15 declarations from the other voters. There's a  
16 declaration that was submitted by the Warren for New  
17 Hampshire campaign, State Director Elizabeth Webster,  
18 who testifies that -- let me just pull up her  
19 declaration -- who testified that the campaign had  
20 prepared educational materials concerning the process of  
21 registering to vote but were advised not to use them  
22 until the issues of the application of the exceptions  
23 contained in the definition of residency in the motor  
24 vehicle code were addressed and clarified.

25           She notes that the lack of clarity from the

1 Secretary of State's Office has left a lot of confusion  
2 in college campuses across the state, and it's extremely  
3 unclear what happens after students vote if they have an  
4 NH license -- if they do not have an NH license and  
5 drive a car anyway in New Hampshire.

6 THE COURT: You don't have to go over the  
7 evidence. I have the evidence. The hard part of this  
8 case are not the facts. It's the law.

9 You're basically saying -- I've got two  
10 problems with this idea regarding section 255:88 (sic),  
11 and the other is -- the question is what do I certify.  
12 It's not that I don't think they're good questions. I  
13 obviously do. That's why I'm sending them to the New  
14 Hampshire Supreme Court.

15 As far as I know, you didn't make these  
16 arguments in the supreme court on the first opinion,  
17 right? These arguments, which I think are good  
18 statutory construction arguments, mostly involving the  
19 rule against implied appeals or the rule against  
20 surplusage, all that, because these -- what these  
21 statutory construction arguments amount to is an  
22 interpretation of the law that it didn't achieve what it  
23 was meant to achieve; that it didn't add burdens to,  
24 didn't add domestication requirements to those who  
25 register to vote as college students, but I don't see

1 where you made those arguments in the state court. Did  
2 you?

3 MR. KLEMENTOWICZ: So let me just start by  
4 saying I wasn't with --

5 THE COURT: It doesn't matter. It doesn't  
6 matter.

7 MR. KLEMENTOWICZ: But importantly, I think my  
8 clients didn't submit briefs in the state supreme court.  
9 I don't think they can be prejudiced by the briefs that  
10 were submitted in the state supreme court when --

11 THE COURT: You can't be prejudiced. I'm just  
12 asking. I'm asking a question.

13 The supreme court I don't think has ever heard  
14 these arguments. It certainly didn't address it in its  
15 opinion.

16 MR. KLEMENTOWICZ: I'm not aware that the  
17 supreme court heard these statutory construction  
18 interpretations, but I do think that it's important  
19 because -- okay. So just assume for a second that RSA  
20 259:88 means what we think that it means, right, and  
21 that the New Hampshire Supreme Court after the question  
22 is certified is going to rule that there's an entire  
23 class of plaintiffs who do not need to get New Hampshire  
24 driver's licenses, right? Those people --

25 THE COURT: People who have maintained a

1 residence in any other state for any reason.

2 MR. KLEMENTOWICZ: Right. Those people will  
3 have been subjected to months of confusion and some of  
4 whom may have decided that they didn't want to vote  
5 because they didn't want to get a New Hampshire driver's  
6 license and they thought that they had to if they did  
7 register to vote, some of whom may have gone ahead and  
8 bought New Hampshire driver's licenses anyway just  
9 because they were following the wrong advice. Now  
10 they're spending money that they didn't have to because  
11 of the confusion by the state, right?

12 They've been subjected to the state telling  
13 them wrong information about the consequences of voting,  
14 which can in turn deter them from voting, right, or  
15 diminish their rights.

16 THE COURT: They've registered and paid the  
17 fees and they're going to be deterred from voting.

18 MR. KLEMENTOWICZ: So some of them have  
19 registered and paid their fees.

20 THE COURT: I'm just taking the example you  
21 just gave.

22 MR. KLEMENTOWICZ: Right, but some of them I  
23 think -- one of my examples was people who may have  
24 decided against registering to vote in New Hampshire  
25 because they didn't want to pay the fees and they



1 thought that they had to but they didn't.

2 THE COURT: Let me try it this way. I do see  
3 your point. Is there authority, though, for the  
4 proposition that -- I guess the question is does the  
5 Eleventh Amendment permit this Court to enjoin state  
6 officials' conduct based on an incorrect interpretation  
7 of state law? That's the question, right? What's the  
8 authority for that proposition?

9 MR. KLEMENTOWICZ: Okay. So the Eleventh  
10 Amendment permits a federal court to issue relief  
11 against state agencies in their official capacity to  
12 enjoin them to conform their actions with federal law.

13 THE COURT: Yeah.

14 MR. KLEMENTOWICZ: So in this case, a court  
15 can enjoin a state actor to comply with Anderson-Burdick  
16 and its protections under the First and Fourteenth  
17 Amendment on a prospective basis without running into  
18 the Eleventh Amendment. That's Ex Parte Young.

19 THE COURT: Yeah, I think I can enjoin this  
20 conduct -- I can enjoin the state's officious conduct  
21 based on an incorrect interpretation of state law if I  
22 also find that that interpretation violates the Federal  
23 Constitution. I think that's clear. I think that's  
24 where you're going, right?

25 MR. KLEMENTOWICZ: Right.

1           So confusion -- so there's case law that  
2 suggests that confusion to the extent that it causes a  
3 burden on the right to vote is cognizable under the  
4 Anderson-Burdick framework. So that's Guare, right,  
5 where people were being told incorrectly that they had  
6 to get a New Hampshire driver's license as a consequence  
7 of registering to vote; that Part 1, Article 11 claimed  
8 that the New Hampshire Supreme Court brought the  
9 Anderson-Burdick framework forward and used that, right?

10           So there's the Purcell case from the U.S.  
11 Supreme Court which talks in the context of injunctions  
12 issuing too close to an election that confusion can be a  
13 burden.

14           Most commonly it arises in the context of  
15 ballot layout, but there's nothing that says that it has  
16 to, and the defendants provide no cases that say that it  
17 has to. And if there were one, I'm sure they would have  
18 found it. They're talented lawyers. They would have  
19 cited a case that says it has to be a ballot case, it  
20 has to have happened at the ballot box.

21           That's not what the law says. The law says if  
22 the law causes a burden on the right to vote. And so  
23 our argument that we're presenting to you is, consistent  
24 with the evidence, this confusion over whether people  
25 have to get driver's licenses because they register to

1 vote, this confusion arises as a consequence of  
2 registering to vote. It doesn't hit all of New  
3 Hampshire rights equally.

4 We know from Dr. Herron's report in his  
5 affidavit, which we provided to the Court, that there  
6 are over 8,000 people who used out-of-state ID in 2016  
7 in the general election. We know that they were  
8 overwhelmingly young people and college students. We  
9 know that they were more likely to be undeclared and  
10 Democrats than Republicans. We know that it's hitting  
11 these discrete subgroups, including, you know,  
12 constitutionally suspect classes differently.

13 So let me just call up Dr. Herron's affidavit.  
14 So this is document 72-7.

15 THE COURT: Yeah.

16 MR. KLEMENTOWICZ: So going to page 9, for  
17 example.

18 THE COURT: Who are we talking about?

19 MR. KLEMENTOWICZ: We're talking about the  
20 discriminatory burden.

21 THE COURT: No, what document?

22 MR. KLEMENTOWICZ: Oh, I'm sorry. 72-7.

23 THE COURT: In English what are you talking  
24 about?

25 MR. KLEMENTOWICZ: This is Michael Herron's

1 declaration. Dr. Herron is a professor of government  
2 and quantitative social sciences who performed an  
3 analysis of the categories of people who used  
4 out-of-state identification when they registered to  
5 vote.

6 He writes that his algorithm undercounts the  
7 rate of college student voters because it only bases it  
8 if people have their dorm names in their registration  
9 address. But even with this conservative algorithm we  
10 can see, for example, that in the 2016 general election  
11 approximately 24 percent of college students used  
12 out-of-state ID. For non-college students that rate was  
13 closer to 1 percent. On figure 6 we can see that the  
14 rate of usage of out-of-state ID was around 12 percent  
15 for people who were 18, 19, and 20, and 21, but then as  
16 soon as you get to about 25, the rate of usage of  
17 out-of-state ID drops to about 2 percent, where it  
18 stays.

19 He does an analysis of the rates of usage of  
20 Democrats and Republicans and undeclared and shows that  
21 Democrats and undeclared use out-of-state ID at a  
22 significantly higher rate than do Republicans.

23 These are burdens of confusion that are  
24 subjected on voters about whether they need to get New  
25 Hampshire driver's licenses if they drive. They don't

1 fall evenly. They fall upon suspected class --  
2 protected classes at higher rates. They burden the  
3 right to vote by --

4 THE COURT: -- protecting classes.

5 MR. KLEMENTOWICZ: Well, political  
6 affiliation, right, young people.

7 THE COURT: Yeah. Young people? What do you  
8 mean, by like the amendments?

9 MR. KLEMENTOWICZ: Yes. People who are under  
10 21 who are protected actually by the 26th Amendment.

11 So we know that there's a burden, we know that  
12 it's discriminatory in its effect, and we know that it  
13 arises in the context of voting. And we know from the  
14 people who work in college towns where out-of-state  
15 users of ID -- where users of out-of-state ID are most  
16 likely to live or at least in the top ten towns  
17 probably, Hanover and Durham, that it's going to cause  
18 confusion at the polls and potentially cause people not  
19 to exercise the right to vote. We know it's going to be  
20 discriminatory.

21 So we look at the burden, and then we weigh  
22 it against the state's interest, like why is the state  
23 doing this, what interest does the state have in the  
24 law, but also what interest does the state have in using  
25 the evidence that we're seeking to enjoin from in

1 prosecutions when they haven't been doing that  
2 historically to prove residence, what interest do they  
3 have in telling people likely what the wrong law is, and  
4 in confusing voters, because that's the challenged  
5 conduct. So what interest does the state have in  
6 telling people that they have to get a license to vote  
7 if they don't?

8           So the interests that the state advances are  
9 that the law removes confusion. So I think this is  
10 pretty contrary to the weight of the evidence. I think  
11 there's ample evidence from Clerk McClain, from Ann  
12 Shump, from the individuals from the Warren campaign  
13 that in fact HB 1264, its interplay with RSA 259:88 and  
14 the way it's been implemented introduce confusion,  
15 right?

16           There's nothing saying that people -- there's  
17 no evidence saying -- and the state has had  
18 opportunities to put on evidence of their interest and  
19 have chosen to leave one side of the scale empty.

20           There's similarly no evidence that this is  
21 improving public perception in elections. Again, people  
22 could be concerned, you know, the view of the electorate  
23 could be that the New Hampshire legislature is trying to  
24 fence people out from the electorate. That's voter  
25 suppression. That's making it more difficult to vote.

1 That's decreasing confidence in the elections because  
2 people are being fenced out.

3 THE COURT: Well, what about something simple  
4 like we want people who vote in our state to contribute  
5 to the upkeep of its roads and bridges so we have them  
6 domesticate their license and registration because they  
7 live and drive here? Does that seem crazy to you?

8 MR. KLEMENTOWICZ: So there's no evidence that  
9 this law actually does that, right, or that it's doing  
10 it any more than it was before. We have no idea if the  
11 state is making more money than they were before in  
12 registration fees.

13 THE COURT: The law is fairly on the books.

14 MR. KLEMENTOWICZ: True, but the state has an  
15 opportunity to advance evidence in support of their  
16 contentions and at most they could say, you know, maybe  
17 more people are buying New Hampshire driver's licenses  
18 but maybe not, maybe all that's happening is people are  
19 choosing not to vote in New Hampshire, right? And this  
20 community of interest standard, by the way, is the type  
21 of thing that courts have questioned and we cite this  
22 all over our brief --

23 THE COURT: Suppose -- let's just take your  
24 example. Suppose one chose not to vote because one  
25 said, well, I don't want to make a contribution to the

1 roads where I live and drive. Is that impermissible  
2 voter suppression? It sounds like you're saying it is.

3 MR. KLEMENTOWICZ: I am saying that it is.

4 THE COURT: Okay.

5 MR. KLEMENTOWICZ: I don't think that the  
6 state has an interest in fencing out qualified voters  
7 because they're unwilling to pay, which is another way  
8 of putting what your Honor just said.

9 THE COURT: Not the way I put it, but I guess  
10 it is another way.

11 MR. KLEMENTOWICZ: But RSA 654:1-a says that  
12 these people, college students who meet the definition  
13 of domicile are entitled to vote.

14 The case law says that the public interest is  
15 served when more qualified voters vote. That's in the  
16 public interest is to increase turnout rates.

17 THE COURT: That's a good point.

18 MR. KLEMENTOWICZ: To get people out from the  
19 franchise isn't in the public interest.

20 THE COURT: It's easy to forget that there is  
21 a statute that basically domiciles college students in  
22 our state, and that's a judgment that the legislature  
23 has made.

24 MR. KLEMENTOWICZ: That's right.

25 THE COURT: All right.



1           MR. KLEMENTOWICZ: And so to the extent that  
2     it's the state's or the legislature's goal to impose  
3     fees upon people who are choosing to vote, that's the  
4     type of fencing out that courts have looked at with  
5     skepticism and that's why this kind of community of  
6     interest idea is viewed with such skepticism in courts,  
7     because you could just as easily say, well, maybe the  
8     state just wants to make it so that only people who are  
9     committed enough to pay \$100 to register to vote -- I  
10    mean, it's a very slippery slope. That's a more  
11    explicit poll tax, but it's the same idea as what's  
12    happening here where the state has said, we only want  
13    people who are willing to pay to vote here.

14           So I think if you look at the interests that  
15    the state has advanced, you'll see that they are, number  
16    one, not supported by any evidence; number two, weak;  
17    and number three, there's no evidence that these were  
18    the actual -- except I think from the confusion  
19    suggested interests that these were the actual interests  
20    considered by the legislature when they passed the law.

21           So if you look at the Guare case again, the  
22    Guare Court suggests that under intermediate scrutiny  
23    they won't look at (inaudible) justifications for the  
24    law. And so I think if you look at the law and say  
25    people are being told the wrong thing, right, what the

1 law likely is is RSA -- you know, RSA 259:88 likely  
2 doesn't require this category of probably 8,000 people,  
3 many of whom are young, many of whom are college  
4 students, from paying this money to register to vote.  
5 It probably doesn't. The state is telling them that it  
6 does. Right? That's incorrect legal advice. That's  
7 confusing, discouraging --

8 THE COURT: Say that again. I didn't follow  
9 that. The state is telling people X that's incorrect.  
10 What is X?

11 MR. KLEMENTOWICZ: X is that by registering to  
12 vote, now they have to get a New Hampshire driver's  
13 license to drive.

14 THE COURT: Okay. The point is 255:88 maybe  
15 means that they don't.

16 MR. KLEMENTOWICZ: Right. It maybe means that  
17 they don't. But if they are, if it does, they're being  
18 burdened with this confusion because they're being told  
19 the wrong advice and either discouraged from registering  
20 to vote in New Hampshire, as is their statutory right,  
21 or they're being forced to spend this extra money.

22 And the problem is this confusion, the wrong  
23 legal advice, inaccurately stating the law, is precisely  
24 the type of unconstitutional burden under  
25 Anderson-Burdick that the Guare Court has identified.

1 THE COURT: You say it's precisely the type,  
2 but you don't give me any examples. That's the problem.

3 MR. KLEMENTOWICZ: Guare, right?

4 THE COURT: There's a huge difference.

5 MR. KLEMENTOWICZ: Okay.

6 THE COURT: But Guare is similar. It is.

7 MR. KLEMENTOWICZ: Yeah. But if Guare is  
8 right, that it's a violation of the Anderson-Burdick  
9 framework to inaccurately tell people what the law is,  
10 then it follows that it's not a violation of the  
11 Eleventh Amendment to enjoin people from telling people  
12 the wrong legal advice.

13 And so if your Honor thinks that the New  
14 Hampshire Supreme Court would probably say that RSA  
15 259:88 means that college students don't have to get New  
16 Hampshire driver's licenses, then it's required under  
17 Anderson-Burdick to correct that confusion and it's  
18 authorized to do so under the Eleventh Amendment. And  
19 the way to remedy that confusion is to issue an order  
20 saying you have to interpret the law and administer it  
21 consistent with what I think the New Hampshire Supreme  
22 Court would say, which is that people who register to  
23 vote in New Hampshire who claim residency in another  
24 state for another purpose don't have to comply with  
25 these motor vehicle obligations, and the only way to

1 make that so, the best way to make that so is by barring  
2 the use, as your Honor suggested, of this type of  
3 evidence in these prosecutions.

4 THE COURT: You can suggest it, but the state  
5 didn't agree to do it.

6 MR. KLEMENTOWICZ: They didn't.

7 THE COURT: And I still don't understand why.  
8 I do understand why. I shouldn't have said that. They  
9 explained why.

10 MR. KLEMENTOWICZ: But I think the key is if  
11 it's curing the violation of the Anderson-Burdick  
12 framework, it's within Ex Parte Young, right? So if the  
13 confusion -- let me try this again. I'm sorry.

14 If the state is wrong about RSA 259:88,  
15 they're telling people the wrong thing, that's  
16 confusing. That's burdening the right to vote because  
17 it's discouraging people from voting potentially.  
18 That's unconstitutional. Telling them to interpret the  
19 law correctly is the only injunction that can issue to  
20 address that confusion.

21 THE COURT: Why are you so focused on 259:88  
22 both in the evidence presentation and in the argument  
23 and not on the student domicile statute? Isn't that  
24 another statute that means nothing if this statutory  
25 regime is what the state says it is or what you

1 originally said it was, right?

2 It seems to me that if -- it seems to me  
3 there's a student domicile statute that says students  
4 can vote.

5 MR. GALDIERI: There is. There is.

6 THE COURT: One might argue, and you saw my  
7 certification proposal, if that's interpreted to mean  
8 that these New Hampshire fees don't apply to students,  
9 then there's no burden on the right to vote, right? Do  
10 you follow that?

11 MR. GALDIERI: I'm sorry?

12 THE COURT: I don't think it's an argument  
13 that anyone is really gravitating around. One of the  
14 certification questions is the student domicile statute.  
15 That statute alone might mean students don't need to pay  
16 these fees because they're a student. A student could  
17 say, I'm a college student, I'm a domicile here. It  
18 says right here in the law. I don't need anything else  
19 to vote. I can't be required to pay these fees.

20 You're not making that argument is what you're  
21 telling me now. Is that an argument you're going to  
22 make in the supreme court.

23 MR. KLEMENTOWICZ: It is an argument that  
24 we're --

25 THE COURT: Then why aren't you making it now?

1 MR. KLEMENTOWICZ: Because I think that RSA  
2 259:88 is a better argument.

3 THE COURT: More explicit?

4 MR. KLEMENTOWICZ: I just think it is.

5 A couple other smaller points that I want to  
6 make just to respond to what the state raised in their  
7 brief. They talk in their papers about how people who  
8 are nonresidents are nonetheless required in some  
9 circumstances to get New Hampshire driver's licenses.

10 THE COURT: Yeah, I was just about to ask you  
11 about that. It would seem to apply to your UNH law  
12 student witness.

13 MR. KLEMENTOWICZ: Yeah. I think that's a  
14 tortured reading of the statute. So RSA 259:67 is the  
15 statute that defines nonresident, and what it says is  
16 that, except as provided in paragraph 2 which is not  
17 relevant: Any person whose legal residence is in some  
18 state, district, or country other than New Hampshire but  
19 not a resident, having a regular abode or place of  
20 business within the state for more than six months in  
21 any year shall be deemed a resident -- and this is the  
22 key point -- as to all vehicles principally used in  
23 connection with such abode or place of business, and the  
24 director for the purposes of registration shall  
25 determine what vehicles are so used.

1           That's a statute about vehicle registration.  
2     It says nothing about -- it doesn't say that people are  
3     residents for the purpose of licensing. It says if  
4     you're a resident of Massachusetts and you have a store  
5     in New Hampshire and your store has a car, that car has  
6     to have New Hampshire tags. It doesn't say that you  
7     have to have a New Hampshire license to drive it.

8           THE COURT: No, no.

9           MR. KLEMENTOWICZ: Right. So then you look at  
10    RSA 263:36 which says: No owner of a pleasure vehicle  
11    and no nonresident or driver thereof holding a license  
12    to drive in the state, district, or country in which he  
13    resides shall be required to obtain a license to drive  
14    such vehicle in any state.

15           I think that's pretty clear that if you have a  
16    license to drive in another state and you're a  
17    nonresident, you don't have to get a New Hampshire  
18    driver's license.

19           THE COURT: What about vehicle registration?

20           MR. KLEMENTOWICZ: Vehicle registration is  
21    maybe different, but it also says that the director for  
22    the purposes of registration shall determine what  
23    vehicles are so used. It doesn't say how that works,  
24    whether the director has to determine that your vehicle  
25    is used principally in New Hampshire.

1           But in any event, there's a large category of  
2 people who have cars that may or may not be principally  
3 used in New Hampshire and so would still be burdened by  
4 having to domesticate a registration.

5           THE COURT: What's the statutory cite again?

6           MR. KLEMENTOWICZ: The statute?

7           THE COURT: Yeah, for the one we just talked  
8 about.

9           MR. KLEMENTOWICZ: 259:67(1), which is about  
10 nonresident registrations, and 263:36 and also 38, which  
11 are about pleasure vehicle drivers.

12           THE COURT: Hold on. 259:67, shall be deemed  
13 a resident as to all vehicles principally used in  
14 connection with such abode or place of business, and the  
15 director for the purposes of registration shall  
16 determine what vehicles are so used.

17           It's basically saying the director will  
18 determine if you have to register the vehicles, right?

19           MR. KLEMENTOWICZ: Yes. It's silent about  
20 licenses.

21           THE COURT: It's silent about licenses, but it  
22 says: Shall be deemed to be a resident, and, as to all  
23 vehicles. I'm not sure what that means.

24           MR. KLEMENTOWICZ: Well, I would think you  
25 would have to -- I mean, practically, if you're



1 driving -- I mean, what, are you going to have to switch  
2 licenses depending on what vehicle you're driving? That  
3 doesn't really make sense. I'm not sure you're even  
4 allowed to have two licenses.

5 But if you're using a vehicle principally used  
6 in connection with that abode, you use a New Hampshire  
7 license; if you're using a different vehicle, you use an  
8 out-of-state license? I don't think that's what the  
9 statute really is about.

10 THE COURT: Okay.

11 MR. KLEMENTOWICZ: I don't know if your Honor  
12 is interested in hearing about Younger abstention. I  
13 can talk about it. They raised it in their objection.

14 THE COURT: I hear about it all the time. I  
15 know it very well. You don't need to talk about that.

16 MR. KLEMENTOWICZ: Okay. Just the key point  
17 on that is that the federal court plaintiffs are not  
18 parties to the state court actions, so Younger  
19 abstention only applies where they're really intertwined  
20 with the state court parties, who we don't even know if  
21 they exist or who they are. There's no way for us to  
22 know if they're so intertwined.

23 Could I have a minute?

24 THE COURT: All right.

25 MR. KLEMENTOWICZ: Your Honor, my co-counsel

1 has a Florida case.

2 THE COURT: I'm happy to listen.

3 MS. EBENSTEIN: Your Honor, with apologies, I  
4 can't write my notes properly right now. There's a case  
5 out of Florida, League of Women Voters v. Browning.  
6 It's 863 F.Supp. 2d 1155, and I would just refer you to  
7 1164.

8 That case relates here -- it has to do with a  
9 law in Florida that regulated third-party voter  
10 registration organizations where the state was giving  
11 people who wanted to undertake voter registration from  
12 the registration organization side --

13 THE COURT: Third-party voter registration  
14 organization. What is that?

15 MS. EBENSTEIN: The League of Women Voters  
16 being a good example. They go out and voluntarily --

17 THE COURT: Oh, sure.

18 MS. EBENSTEIN: So it gave a form that those  
19 volunteers, for groups like the League of Women Voters  
20 had to sign, and in that form it misstated what the law  
21 was.

22 And so while the Court didn't specify voter  
23 confusion or third-party voter registration organization  
24 confusion, it had to do with the state misstating the  
25 law and preventing people from undertaking registration,

1 registering and voting on that basis.

2 THE COURT: Right. But all this argumentation  
3 you're advancing right now, and I guess it's an obvious  
4 point I should have raised earlier, it's all based on my  
5 agreement that it's likely that the New Hampshire  
6 Supreme Court will say that this exhibit, November 7,  
7 the November 7th letter, Exhibit 11, misstates the law  
8 because it doesn't make reference to or explain RSA,  
9 what is it, 625:88?

10 MR. KLEMENTOWICZ: 259:88.

11 THE COURT: I'm sorry. 259:88. That's the  
12 argument, right?

13 MR. KLEMENTOWICZ: I think that's the cleanest  
14 argument, but I think that there's ample evidence that  
15 even if the New Hampshire Supreme Court wouldn't find  
16 that, voters are still being confused. I think that  
17 there's still evidence from Elizabeth McClain and from  
18 Ann Shump and the six individuals who we had, including  
19 Ms. Suskie, you know, who tried to deregister.

20 But even if the state isn't wrong about RSA  
21 259:88, I think people are still confused about their  
22 obligations and they're not being sufficiently --

23 THE COURT: Give me that cite again for  
24 Florida.

25 MS. EBENSTEIN: Sure. It's League of Women

1 Voters of Florida v. Browning, 863 F.Supp. 2d 1155, and  
2 it's at 1164. It's from the Northern District of  
3 Florida in 2012.

4 THE COURT: Who's the judge? Do you know?

5 MS. EBENSTEIN: Hinkle.

6 THE COURT: And your point is, if I understand  
7 you correctly, it's not that it's a voter confusion  
8 case, but it is a case about -- it's a case about  
9 misinformation I guess, an incorrect interpretation of  
10 the law being disseminated on third-party voter  
11 registration organization forms.

12 MS. EBENSTEIN: Even more specifically, your  
13 Honor, it's a case where it says that what is required  
14 of third-party volunteers is so vague and it's misstated  
15 on a particular form they have to sign that -- it's an  
16 Anderson-Burdick case. It burdens the right to vote  
17 because they can't -- based on the law, they can't  
18 follow it correctly or they'll be chilled from  
19 undertaking election-related activities because they  
20 can't follow this law.

21 THE COURT: How old is that case?

22 MS. EBENSTEIN: 2012.

23 THE COURT: Thank you.

24 MS. EBENSTEIN: Sure. Thank you.

25 THE COURT: All right. Are you all set, Mr.

1 Klementowicz? Are you all set?

2 MR. KLEMENTOWICZ: Yes. Thank you.

3 THE COURT: Jadean, how long have we been  
4 going?

5 THE CLERK: You have like another twenty  
6 minutes or so.

7 THE COURT: Okay.

8 MR. GALDIERI: Thank you, your Honor. I would  
9 just like to start with a brief point that I think  
10 highlights one of our main arguments, and it just  
11 references the last case that was presented to you,  
12 League of Women Voters versus Browning. I haven't read  
13 that whole case, but the way it was described is that  
14 there are laws in Florida that permit third-party voter  
15 registration organizations to register people to vote  
16 and that is part of the election laws of the state.

17 What we have in this case is a law that  
18 changes two definitions in RSA 21, which is the  
19 statutory construction chapter of all of the New  
20 Hampshire RSAs, it's like the Dictionary Act in the  
21 federal code, and it removes four words.

22 And the plaintiffs' argument is the removal of  
23 those four words when and if those definitions enter the  
24 motor vehicle code make my motor vehicle obligations to  
25 the state uncertain and that therefore places a burden

1 on my right to vote.

2 I have read no case applying Anderson-Burdick  
3 to any statute that operates like that, any statute that  
4 is a basic part of being a resident of the state, a  
5 person, a citizen is obligated to do something and that  
6 Anderson-Burdick applies to that scenario, and the  
7 Anderson-Burdick cases talk very clearly about the  
8 voting process, the voter registration process, about  
9 ballots, ability to get on the ballots, access to the  
10 election system, not laws and rules and regulations that  
11 exist outside of the system may affect a person's  
12 decision to legally change their domicile and are part  
13 of that calculus but do not impact their ability to  
14 register to vote or vote.

15 If they would like to be domiciled in New  
16 Hampshire, they can come in and be domiciled here and be  
17 subject to all the same civic rights, duties, and  
18 obligations as the citizens of New Hampshire. If they  
19 say, I don't want to be part of that community, I don't  
20 want to have those obligations, they can vote where they  
21 came from and maintain their status in the communities  
22 where they came from where they don't mind being part of  
23 those rights, duties and obligations.

24 So that is the main difference between the law  
25 in this case, and the law in this case does not fence

1 out voters from the franchise. The term "fencing out  
2 voters" means it excludes them from being able to vote  
3 anywhere at all. They can't vote. That's not what this  
4 law does. This law may complicate their decision about  
5 whether or not they would want to change their legal  
6 domicile, but that does not fence them out from voting.  
7 They get to vote somewhere if they choose.

8 Our position in this case obviously is that HB  
9 1264 is not confusing, that the statutory construction  
10 analysis works under well-settled principles of  
11 statutory construction, and that this confusion theory  
12 that the plaintiffs have advanced now in mid-October is  
13 not legally cognizant. There's no case law to support  
14 it.

15 The one case that touches on confusion related  
16 to how laws operate, there's the Washington Republican  
17 Party case from the Ninth Circuit and there's an  
18 argument made that the way the election laws and  
19 regulations operate would confuse people, and the Ninth  
20 Circuit thought it was wholly implausible that  
21 individuals would be diving into the nuances of the  
22 election code and that would be causing --

23 THE COURT: Yeah, a separate --

24 MR. GALDIERI: -- any sort of actual  
25 confusion. This case is also not like the Guare, the

1     State versus Guare in the New Hampshire Supreme Court.

2             That was a case about a registration form.  
3     That registration form is part of the election process  
4     people encounter when they register to vote. And this  
5     law is not that. You don't encounter it during the  
6     election process. As most of the declarations reveal,  
7     there are many people in the declarations that  
8     plaintiffs have submitted not aware of 1264 when they go  
9     to register to vote and that's because it's not part of  
10    the process.

11            Ms. Suskie is an interesting witness in a few  
12    senses. I think the most notable sense is Ms. Suskie's  
13    testimony establishes that she's in New Hampshire for  
14    the indefinite future. If 1264 were enjoined, she would  
15    still be a resident of this state. She has no intent to  
16    go back to Arkansas, she doesn't know when she's leaving  
17    New Hampshire, and she's domiciled here. She meets the  
18    pre-1264 test to be a resident and would have to get a  
19    license under the preexisting motor vehicle regulations.

20            And I think the point your Honor raised  
21    earlier that the remedy for confusion is clarification,  
22    I think that is exactly correct.

23            Since this confusion argument has been raised  
24    and put out there -- one of the issues that I see in  
25    this case is that we're responding to confusion that



1 manifests itself not by folks coming in and saying, hey,  
2 we're really confused about this, this, and this, do you  
3 think we could, I don't know, put some kind of a very  
4 specific guidance form together or something we can get  
5 together?

6           It manifests itself in the media. It  
7 manifests itself in the declaration. You know, we're on  
8 certification and the plaintiffs are demanding that all  
9 three agencies speak in one voice because we have people  
10 out there who seem like they have an agenda to call the  
11 DMV and ask Lorrie at the DMV, do you know about 1264,  
12 and Lorrie may know and she may not know and she's a  
13 lower-level employee at the DMV. And they say, oh,  
14 you're not all on the same page, there's too much  
15 confusion, and so that confusion gets addressed, but  
16 then that's not good enough. That's causing more  
17 confusion. And, you know, every time we try to clarify  
18 that clarification and address the confusion, they come  
19 back and say, well, that's not good enough.

20           You know, one of the steps we're going to be  
21 taking is doing a list of FAQs to get a little more  
22 brand-aware. Those aren't fully out yet and developed,  
23 but we're planning on putting them out.

24           THE COURT: That's important to me. When? Do  
25 you know the timetable?

1 MR. GALDIERI: I don't know the timetable. I  
2 know we have a draft now, I know that, and so we can get  
3 those out --

4 THE COURT: Are you prepared to make a couple  
5 representations about it if I ask? Because it's  
6 important to me. I mean, one of the questions I was  
7 going to ask you today, because I happen to think the  
8 likely remedy for confusion is clarification, and I  
9 think that this November 7th letter here clarifies to a  
10 degree, but plaintiffs' counsel have pointed out some  
11 issues with it. Like, for example, the section 88  
12 question, are you going to address that in the  
13 frequently asked questions?

14 MR. GALDIERI: 259:88?

15 THE COURT: Yeah.

16 MR. GALDIERI: And what would be the question?

17 THE COURT: What its effect is on all of this.  
18 If a person claims residency in another state like the  
19 witness we heard from, what is the impact of that on the  
20 right to vote or at least on the registration -- is a  
21 person in that situation required to declare residency  
22 and then undertake the obligations, because that's  
23 confusing.

24 MR. GALDIERI: So part of the November 7th  
25 letter --

1 THE COURT: Yeah.

2 MR. GALDIERI: -- is the analysis, the  
3 analysis that's been presented to you in the briefs, but  
4 in a manner where we know our audience is not the Court,  
5 our audience is local election officials or other  
6 people.

7 THE COURT: Yeah.

8 MR. GALDIERI: I think one of the concerns is  
9 as you start loading guidance up with all these  
10 statutory references and talking about all the  
11 intricacies of the statutes, you get into a place  
12 where regular people --

13 THE COURT: You might confuse it more.

14 MR. GALDIERI: Right. I mean, part of this  
15 analysis is an understanding that that is how 259:88  
16 works. 259:88 says you're a resident as defined in  
17 21:6, which now means a domiciliary, except if you have  
18 a residence, which now means a domicile, in another  
19 state, and you can only have one domicile. So if your  
20 domicile is here, you can't have a domicile in another  
21 state. If you're a domiciliary here, you --

22 THE COURT: So that statute means nothing  
23 then. It actually means nothing. It's statutory  
24 language that has no application to any person.

25 MR. GALDIERI: Well, it means you're a

1 domiciliary here unless you're a domiciliary in another  
2 state. Then you're a nonresident. And you're only a  
3 nonresident until you've been here for more than six  
4 months driving around, and then you're deemed a resident  
5 under the code as to all of the vehicles you're driving  
6 in connection with your abode.

7 THE COURT: You probably think that made it  
8 clearer, but I'm not sure if it did. I thought you were  
9 going to go in a different direction there, because then  
10 you're only a resident vis-a-vis certain vehicles, and  
11 resident is supposed to equal domicile. And you can  
12 definitely -- under that statute, that last one, you can  
13 be a resident in more than one state as to different  
14 vehicles. I think that's what that statute has to mean.

15 No? You don't agree?

16 MR. GALDIERI: You may be able to do that. I  
17 think the purpose of the nonresident provision of the  
18 statute is if you are present in New Hampshire and for  
19 more than six months you're driving on our roads and our  
20 highways, our statute requires you to get a driver's  
21 license here, if you're driving here more than anywhere  
22 else, and we have an interest in regulating you and  
23 maintaining the safety of our roadways. I think that is  
24 the common sense approach to that provision. And the  
25 plaintiffs would like to live in a world where that has

1 no effect and as long as you're a nonresident, you could  
2 be a nonresident here for eight months out of the year  
3 for the next 20 years, you never have to get a license  
4 to drive in New Hampshire.

5 THE COURT: Let me grab the statute that we  
6 were talking about you said before we jumped onto that.

7 GALDIERI: Sure.

8 THE COURT: Because I think you were talking  
9 about 259:88. My question to you, however, was are you  
10 going to address a frequently asked question about its  
11 application to this, and your point really was, you  
12 know, getting into the weeds like that, not necessary  
13 and not necessarily helpful, right?

14 MR. GALDIERI: Correct.

15 THE COURT: 259:88. Resident shall mean --  
16 which you say means the same as domicile now, right?  
17 Domiciliary, right?

18 MR. GALDIERI: Yeah.

19 THE COURT: Shall mean a resident of the state  
20 as defined in RSA 21:6, except that no person shall be  
21 deemed to be a resident who claims residence in any  
22 other state for any purpose.

23 But it seems clear that students under the  
24 student domicile statute who register to vote and  
25 declare residency can claim residence in another state

1 for another purpose. If they can't, that statute means  
2 nothing.

3 MR. GALDIERI: Well, if an individual student  
4 who registers to vote is declaring that New Hampshire is  
5 the one place more than any other where they participate  
6 in democratic self-government for domestic, social,  
7 civil purposes -- that's not an exact recitation, but  
8 those words are generally in the statute.

9 THE COURT: I'm with you.

10 MR. GALDIERI: And the question is, is that  
11 definition equate or pretty much synonymous with the  
12 definition under RSA 21:6 and 21:6-a, which is that a  
13 resident or inhabitant or both of this state shall be a  
14 person who is domiciled or has a place of abode or both  
15 in this state and who has through all of his actions  
16 demonstrated a current intent to designate that place of  
17 abode as his principal place of physical presence to the  
18 exclusion of all others. That's what it says.

19 Those definitions are -- they don't use the  
20 same words but they are extraordinarily similar in their  
21 consequences.

22 THE COURT: But 259:88 seems to say that you  
23 can fit that definition of domiciliary/resident, which  
24 is now equal, right?

25 MR. GALDIERI: Yep.

1           THE COURT: Except that no person shall be  
2     deemed to be a resident who claims residence in any  
3     other state for any reason. It sounds like what you're  
4     saying to me is a person who fits the definition of  
5     resident/domiciliary under 21:6 could never be deemed to  
6     be a resident anyway of any other state for any purpose,  
7     right?

8           MR. GALDIERI: They could if they're a  
9     domiciliary of another state.

10          THE COURT: If they're a domiciliary of  
11     another state, they couldn't be a domiciliary or  
12     resident of the state of New Hampshire.

13          MR. GALDIERI: Correct. And the term  
14     "residence" is defined in 21:6. It also appears in the  
15     definition of domicile within the motor vehicle code.  
16     It is somebody who takes up residence.

17          So, I mean, our guidance would reflect our  
18     legal interpretation of the law that RSA 21:6-a informs  
19     what the word "residence" means now in RSA 259:88 and it  
20     now means domicile.

21          THE COURT: Yeah. I've dragged you into this  
22     statutory interpretation question anyway and it's,  
23     frankly, much more germane to the whole certified  
24     question than it is to this whole analysis.

25          MR. GALDIERI: But I think the FAQs, your

1 Honor, would be targeted at more so trying to help a  
2 town clerk like Ms. McClain who says, somebody asks me  
3 now that I've registered to vote, do I need to get a  
4 driver's license. So I think you have to get a little  
5 more granular than just yes or no but, you know, how  
6 does that interaction play out? Do you drive in New  
7 Hampshire? No. Okay. So then you don't have --

8 THE COURT: So that's the type of thing that  
9 the FAQs are going to address?

10 MR. GALDIERI: That's my understanding.  
11 There's going to be some more granular information about  
12 how you can answer certain questions with perhaps  
13 certain conditions, provisional, you know, language  
14 about it.

15 THE COURT: And tell me again, even though I  
16 know I just asked you this, but what do you think the  
17 timetable is for that?

18 MR. GALDIERI: I don't know exactly what the  
19 timetable is, but I can move it. I can get it --

20 THE COURT: But there's a draft in play and  
21 it's under discussion?

22 MR. GALDIERI: There's a draft that has just  
23 been circulated. I can't purport to have a mastery of  
24 it but --

25 THE COURT: Okay. Move on. I'm good.



1                   MR. GALDIERI: Okay. And it goes to, you  
2 know, the, you know, in some part we have to be reserved  
3 and measured and very correct in how we put out the  
4 guidance so that we don't create problems. One of the  
5 fears is you're going to provide somebody with a  
6 document that gives a simple answer and it's going to  
7 overlook the fact that that individual has done  
8 something else before registering to vote that  
9 establishes their residency, and then they've been told  
10 by a town official they don't need to do anything for 60  
11 days, and that's not correct. And so those FAQs will  
12 try to be shaped to try to ensure that we don't run into  
13 those issues where we can be accused of having officials  
14 giving advice that turns out to be incorrect because of  
15 people's particular circumstances.

16                   THE COURT: I understand.

17                   MR. GALDIERI: The plaintiffs talk a lot about  
18 the Anderson-Burdick balancing test, and the test under  
19 Anderson-Burdick is for the Court to look at the  
20 character of the burden and the magnitude of the burden.

21                   The character of the burden in this case is an  
22 indirect, very indirect attenuated burden. It is based  
23 mostly on speculation and conjecture that a certain  
24 group of people who Dr. Herron has possibly quantified  
25 are all going to be confused. And we have no evidence

1 that they're all going to be confused, but that's the  
2 speculation and that's the conjecture, and that's the  
3 character of the burden.

4 And when we look to the magnitude of the  
5 burden, the magnitude is very slight. The magnitude of  
6 the burden, if you look at Dr. Herron's affidavit, is an  
7 extraordinarily small amount of the electorate would be  
8 predicted to confront this, and even that number is  
9 underinclusive because you don't know how many of those  
10 people don't drive, don't own a motor vehicle here. You  
11 don't know a number of their circumstances.

12 And the Court in Crawford found explicitly  
13 that just because an election regulation, this is not an  
14 election regulation, but just because an election  
15 regulation places a burden on some voters does not  
16 permit a sort of facial challenge where you can show  
17 success on the merits because it doesn't extend  
18 basically to substantially or a significant portion of  
19 the electorate.

20 And the voter confusion cases that are cited,  
21 that is the tenor of those cases. It is widespread  
22 voter confusion. And you can show widespread voter  
23 confusion in those cases because everybody who registers  
24 to vote will encounter the form. Everyone who takes a  
25 ballot will encounter the ballot. This law does not

1 have the same effect. This law is on its face a  
2 neutral, nondiscriminatory law. The burden is indirect,  
3 it's attenuated, the magnitude of it is small.

4 Under those circumstances, if Anderson-Burdick  
5 were to apply, the burden would be minimal. The burden  
6 would be slight, as the First Circuit has found in the  
7 Werme case and has talked about a similarly slight  
8 burden in the Barr case. And once the burden is slight,  
9 the justifications need only be rationally related to  
10 the legislation.

11 THE COURT: Yep.

12 MR. GALDIERI: And we would argue that our  
13 justifications are more than rationally related to the  
14 legislation; they are in fact compelling state  
15 interests.

16 Eliminating the confusion that has persisted  
17 and existed since -- in recent years about whether  
18 nonresidents, it sounds like nonresidents can vote in  
19 New Hampshire, eliminating that confusion from our  
20 jurisprudence, from our -- from the way our law operates  
21 is a significant and compelling government interest  
22 creating, ensuring a community of interest that everyone  
23 who declares this place as their home and drives on the  
24 roads and engages in all the activities in New Hampshire  
25 contributes the same, has the same rights and duties,

1 they're the people that are going to be serving as  
2 jurors, that they all are part of the same community of  
3 interest.

4 And the really remarkable thing about this  
5 case is that in 1972 in Newburger this Court -- a  
6 three-judge panel of this Court told New Hampshire that  
7 an indefinite intent to remain element is irrational,  
8 and it's irrational because, you know, somebody who, you  
9 know, is very good at planning and knows in two years  
10 they're going to leave this state, and somebody who  
11 doesn't know that, they're treated differently. One  
12 gets to register to vote; the other one doesn't.

13 THE COURT: What was the upshot of that case,  
14 the legislative -- I mean, you gave me the history, but  
15 what happened as a result? Because the indefinite --  
16 the intent to stay indefinitely in the future was only  
17 recently removed from the statute.

18 MR. GALDIERI: So Newburger talks about our  
19 common law domicile. That is our common law domicile.  
20 And if you look at what's in RSA 21:6 and 21:6-a, it is  
21 our common law of domicile.

22 THE COURT: How old are those statutes, the  
23 ones that were -- well, that's domicile. Okay.

24 MR. GALDIERI: They're not that old but  
25 they're old.

1 THE COURT: Yeah.

2 MR. GALDIERI: But 21:6 and 21:6-a essentially  
3 enshrine what was our common law domicile. So in New  
4 Hampshire you have -- and what makes New Hampshire sort  
5 of different than other states is you have a status of  
6 being a nonresident domiciled, you know, for voting  
7 purposes and then super domiciled. You're domiciled,  
8 but you're here for the indefinite future.

9 You don't have a category of people who are  
10 necessarily just resident in the state as the term is  
11 commonly used in other places and in other contexts.

12 So New Hampshire goes in and removes those  
13 four words and in doing so removes the same types of  
14 irrationalities that would pervade other statutes.

15 And, for example, I don't understand the  
16 Department of Safety to ever require as putting a  
17 requirement in place to get a driver's licence that  
18 somebody, you know, sign an affidavit saying they're  
19 here for the indefinite future. That would create  
20 absurd results. Somebody would move here from another  
21 state, say, I'm only here for three years and I need to  
22 get a New Hampshire license because my California  
23 license expired, and they would say, well, are you here  
24 for the indefinite future? No. You can't get a license  
25 here.

1           That's not a rational result. That's not just  
2           how business is done practically. That requirement as  
3           it develops sort of in the common law domicile is not  
4           really a requirement that is within the common law taken  
5           literally and rigidly.

6           THE COURT: All right. Hold on. We need to  
7           take a break for the reporter, but I have more questions  
8           for both of you so I don't want to adjourn yet.

9           So we'll take a little break.

10          MR. GALDIERI: Okay.

11          THE COURT: Thanks.

12          (RECESS)

13          THE COURT: Mr. Galdieri, please proceed.

14          MR. GALDIERI: Your Honor, I was going to move  
15          into a segment of our argument that's related to Ex  
16          Parte Young and have Attorney Garland deliver that part  
17          if that's okay.

18          THE COURT: That is okay.

19          MR. GALDIERI: Thank you.

20          MR. GARLAND: Thank you, your Honor.

21          So we've obviously raised a specific Ex Parte  
22          Young Eleventh Amendment argument in our objection, but  
23          there's one thing I'd like to touch upon first based  
24          upon a question you asked.

25          You asked Mr. Klementowicz whether can,

1 consistent with the Eleventh Amendment, a federal court  
2 order a state official from making incorrect statements  
3 of state law. And the response, which I think you  
4 agreed with, was, sure, if it also violates the Federal  
5 Constitution, right?

6 But there are I think three --

7 THE COURT: If the incorrect statement of  
8 state law would violate the Constitution if true.

9 MR. GARLAND: Correct. That's right. Yeah,  
10 I'll leave it at that. I'll concede that point for now.

11 I think there are three hurdles, though, that  
12 you're going to need to get over to even get there, and  
13 I don't think that you can, and so I think for that  
14 reason alone the Eleventh Amendment bars the claim that  
15 they are trying to bring now.

16 First, you're going to have to find that the  
17 sort of confusion that they're relying on here is  
18 cognizable in the first place. As you raised and as  
19 we've raised in our objection, and Attorney Galdieri  
20 touched upon, we're not aware of any case saying that  
21 two different statutes and an ambiguity in how they  
22 operate is cognizable in terms of a Fourteenth Amendment  
23 claim.

24 THE COURT: Yep.

25 MR. GARLAND: In fact, there is a remedy for

1 that, as you noted, and that's a state court declaratory  
2 judgment action.

3 And really, I mean, thinking about what this  
4 remedy would look like, you're saying there are two  
5 different statutes, they are confusing, it's ambiguous  
6 as to how they operate. Federal court, strike down one  
7 of the statutes. We're not aware of anything that  
8 supports you having the authority to do that,  
9 respectfully, consistent with the Eleventh Amendment.

10 But even if you can get beyond that, you have  
11 to assume, too, that the law operates in a particular  
12 way, in the way that opposing counsel and the plaintiffs  
13 have maintained at least since their amended complaint.

14 But I'm not sure that you can get to that  
15 either because by virtue of certifying those questions  
16 in the supreme court, I think you're asking the supreme  
17 court to weigh in on that, the New Hampshire Supreme  
18 Court as the authority.

19 I'm not aware -- and I haven't dug deep on  
20 this, so forgive me if there is precedent, but I'm not  
21 aware of any precedent that a federal court in the  
22 course of certifying questions to a state court can  
23 weigh into those questions and say it's likely going to  
24 resolve in a particular way and then grant an injunction  
25 for a part of that proceeding.



1           So I just want to raise that as another hurdle  
2     that you would have to get over in order to get there.

3           THE COURT:   Except you haven't dug deep and  
4     you don't have any authority for that, right?  I just  
5     don't think the law of certification is that well  
6     developed, frankly, but -- it's not that I disagree with  
7     you, it's just I'm not worried about it.

8           MR. GARLAND:  Fair enough.

9           But then the third hurdle that I would flag is  
10    that then you would also have to find that this  
11    confusion, if it is cognizable and you're willing to  
12    construe the law in the particular way, also violates  
13    the Constitution, and we simply don't think that it  
14    does.

15          THE COURT:   Is sufficiently burdensome.

16          MR. GARLAND:  Exactly.  That there's a  
17    likelihood of success on that, that they've demonstrated  
18    that today.  And for all the reasons that Attorney  
19    Galdieri said, all the reasons that we've laid out in  
20    our objection, I don't think it does.

21          But I think a greater point here and what this  
22    emphasizes is --

23          THE COURT:   I don't know.  I appreciate you  
24    highlighting the three hurdles and all, but like the  
25    question itself kind of incorporates all of that.  The

1 way I think this is constitutionally permissible under  
2 the Eleventh Amendment, I don't think anybody disagrees,  
3 is if -- we call it confusion, but if Exhibit 11 here  
4 from the plaintiff, the November 7th letter, if it  
5 provided an incorrect interpretation of state law and  
6 that interpretation if true would be unconstitutional, I  
7 don't think the Eleventh Amendment would prohibit me  
8 from issuing an injunction to alleviate it. I think all  
9 those three hurdles are implicit. Maybe the second one  
10 is not because it has nothing to do with the U.S.  
11 Constitution, but the first and third, aren't they part  
12 of that standard?

13 MR. GARLAND: You're right, your Honor, but I  
14 think that provides a good segue into the second point  
15 that I wanted to make which flows into the argument we  
16 have raised in our objection.

17 They're not asking for the sort of relief you  
18 just described there. The relief they're asking for is  
19 two-fold, but they're related. They want an order from  
20 this Court that the state of New Hampshire not use voter  
21 registrations, voter history, in enforcement actions  
22 under the two motor vehicle provisions, right, and then  
23 they want some sort of dissemination from the Secretary  
24 of State's Office that we're not going to do that, that  
25 the state is not going to do that.

1           And as we flagged in our objection, there are  
2 two problems with that. The first one may be more of an  
3 academic one, but I think it's a meaningful problem.  
4 They're asking for that relief against the state itself.  
5 They say New Hampshire. They say state.

6           THE COURT: You have to slow down, Sam.

7           MR. GARLAND: Sorry.

8           And they can't do that consistent with the  
9 Eleventh Amendment. And so at least as requested,  
10 they're saying you order the state of New Hampshire, you  
11 order New Hampshire, and we've cited case law to make  
12 clear that that's not something that's compatible with  
13 the Eleventh Amendment.

14           THE COURT: By the way, how many cases since  
15 this statute has been enacted has the state utilized  
16 voter registration information in enforcing those  
17 violation level offenses for domestication of licenses  
18 and registration?

19           MR. GARLAND: Since the statute has been  
20 enacted, I'm not aware of any.

21           THE COURT: Which is why you shouldn't have  
22 agreed to it to begin with, frankly, but I understand.  
23 The AG was clear on principle that was not something he  
24 was willing to do, but it added a level of complication  
25 to this lawsuit based on so-called principle that is

1 becoming very time-consuming for all of you, because  
2 this is not information that's ever been used in these  
3 violation level prosecutions. The idea that it's some  
4 kind of burden on the state is just implausible. It's  
5 unnecessarily obstructive.

6           It doesn't mean it's not your right to stand  
7 by it, it doesn't, but it really is, you know, it's like  
8 in your brief you say, oh, we have no way of knowing, we  
9 have no way of knowing if this has been done. That's of  
10 course ridiculous. I mean, you have a way of knowing.  
11 In the same way you have ElectionNet to communicate with  
12 your election officers, I feel pretty strongly -- it's  
13 been a long time since I worked in that office, but I  
14 bet you can be in touch with every police department in  
15 this state and get a response within 72 hours on any  
16 question you want, and you could ask the question, do  
17 you have any cases of these violations where you're  
18 using voter registration information or how many of  
19 these cases do you have in general. You did give me  
20 some numbers on that, which was helpful, but the idea  
21 you tell me you're not in a position to know that, that  
22 doesn't seem plausible to me.

23           MR. GARLAND: My understanding, your Honor, is  
24 that would require that we go to every municipality if  
25 they're enforcing it. I don't think in the way that

1 elections exist that --

2 THE COURT: You don't have an e-mail group for  
3 the -- the U.S. Attorney's Office, the Criminal  
4 Division, doesn't have -- we used to do it by fax when I  
5 was there. We could fax every police department in the  
6 state. We went "beep," and the letters went out, right?  
7 I'm not saying it worked very well, but I am saying that  
8 it doesn't seem impossible to at least put everybody on  
9 notice of something and ask for a response. And I  
10 realize a hundred percent responses are not realistic,  
11 but I think the information is available. Certainly  
12 it's available in the context of a litigation.

13 Tell me what you were going to tell me.

14 MR. GARLAND: So that goes more to Younger,  
15 which I wasn't going to get deep into because you  
16 expressed that you were on good footing for that, but I  
17 think that it does touch upon the second Eleventh  
18 Amendment issue, right, if we get beyond the state is  
19 the only entity that relief is actually requested  
20 against.

21 While there is no indication that this sort of  
22 evidence has been used since 1264 went into effect, I  
23 don't think there is any dispute, and we talked about  
24 this before the previous hearing, that that evidence  
25 could be relevant whether or not 1264 were in effect,

1 whether a person is registered to vote, whether a  
2 person's voting history was in the state would be  
3 relevant -- could be relevant. I should say could be.

4 THE COURT: We agree.

5 MR. GARLAND: And I think the problem, though,  
6 with the relief that's requested, your Honor, is that if  
7 you say, yeah, I think it's likely that 1264 violates  
8 the Constitution and you -- the injunction they're  
9 seeking doesn't really have anything to do with that.  
10 It's not bringing any state official's conduct into  
11 conformity with that alleged violation. It's saying do  
12 something -- don't do something that you could do  
13 irrespective of whether this law exists. It goes beyond  
14 the scope of the federal violation they're alleging  
15 here, and so I think that is actually more  
16 fundamental --

17 THE COURT: Doesn't that require me to view  
18 their case as you want me to view it, as a facial  
19 challenge as opposed to as an applied challenge, because  
20 the injunction could be narrowly tailored to, you know,  
21 you can't use it against college students or some kind  
22 of -- it could be a narrowly tailored injunction or  
23 temporary order, couldn't it?

24 MR. GARLAND: I still think that would have  
25 the same problem, your Honor, because it could be used

1 against college students even before. I mean, the  
2 argument that they've raised which I think --

3 THE COURT: You just don't know if it ever had  
4 in the history of the state.

5 MR. GARLAND: I don't, and I admit that. I  
6 admit that, but I think the problem remains. And the  
7 argument that the other side has raised, which I think  
8 you rightfully rejected at our last proceeding, was,  
9 well, this is now conclusive evidence, and of course  
10 it's not. That's up to the trier of fact.

11 But they haven't asked for you to impose some  
12 sort of relief that says what sort of weight this  
13 evidence can be given and I, frankly, don't think you  
14 can. I think that is getting much closer to Younger if  
15 a federal court is saying this sort of evidence should  
16 be given, you know, a certain sort of weight. Again,  
17 they haven't requested that, though.

18 THE COURT: I know, but even in habeas court,  
19 right, in a habeas proceeding somebody could come into  
20 court and say, I was convicted on a coerced confession.  
21 This Court can say, I agree, I grant the writ of habeas,  
22 and I don't have to release the person from  
23 incarceration. I can say, I order a retrial, but you  
24 can't use that evidence. That's an example of -- I  
25 don't know why Younger abstention prohibits me from

1 temporarily saying you can't use certain evidence in a  
2 criminal case when it was unlawfully obtained in the  
3 context of that criminal prosecution.

4           If this is an unconstitutional burden, and I  
5 know we're kind of back to the burden -- the fee burden  
6 or the registration to vote and ensuing obligations  
7 burden, which is not the burden they're talking about  
8 today, the plaintiffs, but still we were just talking  
9 about the temporary order, which is the point you've  
10 raised. I don't know why it's beyond the Court's power  
11 to do that, to say evidence that there's a likelihood  
12 was obtained unlawfully under the Federal Constitution  
13 or that use of it would be unlawful under the Federal  
14 Constitution may not be used in state proceedings  
15 because to do so might violate the Federal Constitution.  
16 Do you understand what I'm saying?

17           MR. GARLAND: I do, your Honor. The two  
18 things -- the same response I think to both of those,  
19 though, is it's not clear why 1264 is making the way  
20 that that information would be communicated. It changes  
21 how that communication would happen. It's not clear why  
22 1264 is -- how that is allowing someone to use  
23 information in a prosecution that they couldn't  
24 previously, and I think that's the problem.

25           That's not a Younger problem. That's an Ex



1 Parte Young problem. Ex Parte Young is narrow. It  
2 requires that you issue prospective injunctive relief to  
3 make a state official conform to the Constitution. If a  
4 state official could do something notwithstanding or  
5 irrespective of the constitutional violation alleged,  
6 and I believe that's the case here, could, then it's not  
7 clear to me how the relief they've requested is  
8 compatible with Ex Parte Young, and that's the point I'm  
9 trying to make.

10 THE COURT: I understand. All right.

11 MR. GARLAND: That's all I have on that.

12 Thank you, your Honor.

13 THE COURT: All right. Mr. Galdieri, anything  
14 else you wanted to say?

15 MR. GALDIERI: I don't, your Honor. I would  
16 rest on our briefing.

17 THE COURT: The 259:67 issue, right, sort of  
18 the newer statute you brought to my attention, the one  
19 that you say requires college students anyway to  
20 domesticate at least their registrations, and maybe  
21 registration and license, with respect to their  
22 residence that is attached to vehicles that are  
23 associated with their New Hampshire abode, right?

24 MR. GALDIERI: Yes.

25 THE COURT: Similar question that I just asked

1 Mr. Garland. Do we know of any situation ever where a  
2 college student has been required to do that, to  
3 domesticate the registration or a license with respect  
4 to vehicles maintained, you know, near a college dorm or  
5 college housing? Has that ever happened?

6 MR. GALDIERI: I do not know a specific  
7 instance of a college student. I think what you're  
8 touching on is the fact that these laws are probably  
9 pretty difficult to enforce if not practically  
10 difficult, but they exist, and that is a question  
11 ultimately in this case that will go to what the burden  
12 is. And if it's unclear, I think our position would be  
13 that if you're going to certify questions over, it may  
14 be a question you certify.

15 THE COURT: Yeah, we're going to include it.  
16 We're going to include it. My big question is, we don't  
17 really have to figure this out now, but I want to  
18 certify it soon now, but my new, what I'm thinking  
19 through now is whether -- we are going to include that  
20 issue -- is whether to include this new state  
21 constitutional argument, right? I wouldn't even  
22 consider it except it's the New Hampshire Constitution  
23 so it's sort of a similar, but it's also much broader  
24 than these other sort of narrow questions. Anyway,  
25 that's just an aside. You don't need to respond. Okay.

1           Okay. So you don't know of any of those, but  
2           your point is that that's not really dispositive or even  
3           helpful. It goes to the burden.

4           MR. GALDIERI: It goes to the burden. If  
5           remaining a nonresident but being here for over six  
6           months requires the same monetary obligations and brings  
7           with it the same specter of enforcement, the burden  
8           hasn't -- there's been no increase or change in the  
9           burden to anyone and it's unrelated to voting. It's  
10          simply related to your presence in the state.

11          THE COURT: I want to pull one or more of  
12          these statutes up just for a second here. There's so  
13          many statutes in play here, I know that's part of your  
14          confusion argument, but --

15          All right. Mr. Klementowicz, do you want to  
16          respond?

17          MR. KLEMENTOWICZ: Your Honor, I have some  
18          rebuttal, but Attorney Christie is going to respond for  
19          the Democratic Party.

20          MR. CHRISTIE: Thank you.

21          Just to respond. Just to tie up some loose  
22          ends, first of all, I think there's oftentimes an  
23          argument raised in these cases that, well, addressing  
24          the burden to vote and the person can just vote where  
25          they came from.

1 THE COURT: I'm the one who raised that, yeah.

2 MR. CHRISTIE: Yeah, and Mr. Galdieri raised  
3 it in his argument as well.

4 That oftentimes is not the case. And the  
5 assumption is, well, even under the old law if someone  
6 is domiciled here in New Hampshire but they're a  
7 resident of another state --

8 THE COURT: We're talking about college  
9 students, though. So I understand your point and I  
10 appreciate you raising it, but let's be real. Can you  
11 think of any circumstances where college students just  
12 can't get an absentee ballot in the town where they live  
13 before they went to college and vote?

14 MR. CHRISTIE: I don't think there's ever been  
15 a survey done to establish --

16 THE COURT: Right, and you have the burden  
17 here so -- it looks like one of your colleagues wants to  
18 chime in.

19 MS. LEE: I just have a specific example of  
20 some sort of brief notice. In the past just -- this is  
21 obviously a limited example, but individuals whose  
22 parents have gotten divorced, once they moved to college  
23 and then no longer live in the state where the student  
24 lived prior to going to college.

25 THE COURT: So neither parent lives in the old

1 state.

2 MS. LEE: Uh-huh. And that's just one example  
3 I know from like other practice.

4 THE COURT: Sure. I take you at your word,  
5 and I don't have any doubt that ACLU lawyers can come up  
6 with a few other horrific stories, but the real question  
7 is here, you know -- I don't know if that student or  
8 that student's problem would rise to the level of  
9 requiring an injunction on the enforcement of a state  
10 law. It just seems like a big ask. And you say --  
11 you're right. There are certain places where there  
12 might not be that right to vote in the state of origin  
13 or prior state, but it doesn't seem like that's a very  
14 widespread problem among college students. I don't  
15 know.

16 MR. CHRISTIE: The point I'm trying to make,  
17 Judge, is that the representation from the state that a  
18 student who came from Oklahoma who's domiciled here in  
19 New Hampshire can just vote in Oklahoma, they don't know  
20 if that's true or not.

21 THE COURT: Do you have any reason to believe  
22 that's not true? I don't.

23 MR. CHRISTIE: I have no reason to believe it  
24 is true.

25 THE COURT: Well, I have plenty of reason to

1 believe it is true, I mean, because you hear about it  
2 all the time. College students vote by absentee ballot,  
3 sort of like in the military. It's not unusual at all.

4 MR. CHRISTIE: In some states.

5 THE COURT: Yeah, I guess you're right. I  
6 guess I haven't heard about it in all 50, but, I mean,  
7 are you aware -- I mean, that's what absentee ballot  
8 voting is for. It's for when people travel.

9 MR. CHRISTIE: It's for when people travel,  
10 not when they've gone to another state for four years,  
11 or three years for law school, and just the assumption  
12 that that means that -- I mean, Mr. Galdieri's argument  
13 on that point --

14 THE COURT: You're raising a fair point, but  
15 here's my response. I really believe that in the  
16 context of -- I can't believe this is the only college  
17 kid voter suppression case in history, right?

18 MR. CHRISTIE: Well, this state's unique.

19 THE COURT: We're unique in what capacity?

20 MR. CHRISTIE: Trying to suppress the vote of  
21 college students.

22 THE COURT: And you may be right about that.  
23 I don't know if it's ever been -- this type of  
24 legislation has ever been enacted elsewhere. I guess I  
25 was assuming it might have been.

1           It seems to me that -- I would assume the ACLU  
2       would be aware of it if there were states that -- if  
3       there were states that burdened the right to vote such  
4       that they were not permitting college students to vote  
5       in their home states, I don't want to call it home  
6       states but their state of origin, their prior state,  
7       that would seem another example, right, and I just have  
8       this assumption that you would be aware of it. You say  
9       you have no reason to believe it either way. I think  
10      common sense tells us that it's probably pretty likely  
11      that most states allow absentee ballot voting by college  
12      students or we'd hear about disenfranchising college  
13      students by their own state, and I've never heard  
14      anything like that.

15           It may be a little bit too commonsensical for  
16      a litigation, but that's my take.

17           Your point, though -- so what's the point you  
18      want to make about this?

19           MR. CHRISTIE: The point I do want to make  
20      about it is that, as highly as I think of him, Mr.  
21      Galdieri has made a representation that any one of these  
22      people can vote in the home state that they came from --

23           THE COURT: And he hasn't proved it.

24           MR. CHRISTIE: There's no evidence to support  
25      that. That's all. It's not the main thrust of my

1 argument. I didn't mean to get bogged down on it.

2 THE COURT: My fault. My fault.

3 MR. CHRISTIE: But turning to just the main  
4 point in response to the state's arguments.

5 You know, the core issue here, the Court has  
6 stated when it started the hearing it's going to certify  
7 questions to the New Hampshire Supreme Court.

8 A core statute -- or a core question of  
9 statutory construction is going to be RSA 259:88, and it  
10 is clear from the evidence in this hearing today that  
11 259:88 has an impact on the issue before the Court,  
12 which is what is the impact of HB 1264. And  
13 historically when sending out letters to people who have  
14 used domicile affidavits to register to vote, the state  
15 has informed people it may trigger an obligation to  
16 obtain a New Hampshire driver's license, and they have  
17 historically cited both 21:6 and 259:88. That was  
18 established through Mr. Scanlan's testimony.

19 And when shown the November 7th letter and the  
20 lack of reference to 259:88 in that letter, whatever it  
21 means, we think it means one thing, Mr. Galdieri -- and  
22 I'll explain why he's wrong in a second but why he  
23 thinks it means something else, Mr. Scanlan agreed it  
24 could be confusing.

25 THE COURT: Yeah, he did say that.



1 MR. CHRISTIE: In response to the very letter  
2 that the state is saying fixes everything.

3 THE COURT: But as far as I know -- and he did  
4 say that.

5 MR. CHRISTIE: He did.

6 THE COURT: As far as I know, though, that's  
7 the only evidence in this case of any confusion over the  
8 applicability or effect of 259:88. There's no evidence  
9 by any of your declarants that they were confused by it.

10 MR. CHRISTIE: Well, I think our declarants  
11 are confused about the impact of 21:6 --

12 THE COURT: Yes.

13 MR. CHRISTIE: -- as modified by 1264, and  
14 21:6 interacts, at least historically, with 259:88.

15 THE COURT: I know. Good try. But none of  
16 your affidavits or testimony today said -- come on.

17 MR. CHRISTIE: They don't, but --

18 THE COURT: And I think you would have  
19 elicited that if it was there.

20 MR. CHRISTIE: Yeah. Well, I think --

21 THE COURT: Don't get me wrong. I think  
22 259:88 is very important. I've made that clear. That's  
23 why I'm certifying it despite the state telling me,  
24 look, these are simple questions. I disagree. I think  
25 the canons of statutory interpretation can be tricky and

1 selectively applied -- I'll let you finish -- but that  
2 to me is an interpretation question that lay people and  
3 voters are probably not that concerned with. That's --  
4 I haven't heard any evidence that any of your  
5 declarants, all of whom are registered to vote by the  
6 way, are confused about that.

7 MR. CHRISTIE: Well, I'll give you an example  
8 why it is important. One of the questions asked --

9 THE COURT: One of the questions asked?

10 MR. CHRISTIE: Hold on. I'll get there.

11 -- by Betsy McClain in her initial e-mail  
12 exchange with Mr. Scanlan was -- I can't find it. I'll  
13 paraphrase it. We have a whole group of people who  
14 registered to vote before July 1, 2019, using  
15 out-of-state driver's licenses who have never gotten New  
16 Hampshire driver's licenses. As of July 1, 2019, do  
17 those people now need to run out and get driver's  
18 licenses?

19 He refused to answer the question in the  
20 e-mail and nobody has answered that question up till  
21 today.

22 So you have a whole class of people out there  
23 who may think under the guidance under the November 7th  
24 letter now have to do it except that 259:88 applies to  
25 them.

1           THE COURT: That's got nothing to do with  
2 whether they're going to vote.

3           MR. CHRISTIE: It has to do with the impact on  
4 people registering to vote in this state if the state  
5 can't even explain to people who have registered to vote  
6 if they need to get driver's licenses now, and if  
7 another college student is sitting there trying to  
8 wonder if I should register to vote if that obligation  
9 applies to me. And under the statutory scheme as laid  
10 out in the November 7th letter the state appears to be  
11 saying, yes, you do have to get a driver's license.  
12 However, it ignores 259:88. And the answer to the  
13 question in 259:88, especially if you couple it with the  
14 domicile statute about college students, the answer very  
15 well, or in my view for what it's worth, is no, and that  
16 is not in any guidance provided by the state in this  
17 case anywhere.

18           The second problem with the state's -- Mr.  
19 Galdieri's interpretation of 259:88 is his claim -- or  
20 the state's claim is that no person shall be deemed a  
21 resident who claims residence in any other state for any  
22 purpose.

23           The state assumes that term "resident in any  
24 other state" is the definition of residence here in New  
25 Hampshire.

1 THE COURT: I think I was, too.

2 MR. CHRISTIE: As opposed to the definition of  
3 residence in the state where the person is claiming  
4 residence.

5 THE COURT: The other state where they're  
6 claiming residence.

7 MR. CHRISTIE: Right. Exactly. So that  
8 clearly was not amended, nor would the state have power  
9 to do that.

10 So what we have here, I think the evidence  
11 establishes in response to the arguments from the state,  
12 the November 7th letter, you have a record in front of  
13 you of voter confusion and confusion by others prior to  
14 the November 7th letter. The November 7th letter is an  
15 attempt to clear up that confusion only filed in  
16 response to this lawsuit.

17 The letter at the very least is a confusing,  
18 and very well could be inaccurate -- in our view is an  
19 inaccurate statement of law. That is exactly the  
20 situation that the New Hampshire Supreme Court  
21 confronted in Guare dealing with the exact same issue.  
22 If you're domiciled, do you have to get a driver's  
23 license in 60 days? It's the exact same issue. It was  
24 on a voter registration form as opposed to just being in  
25 a statute, but --

1           THE COURT: Yeah, I agree, but that addresses  
2 the question about whether this kind of burden is a  
3 burden.

4           MR. CHRISTIE: Yes.

5           THE COURT: Although I'm not sure which way  
6 that case cuts because it involved a form.

7           MR. CHRISTIE: It involved one sentence, so  
8 one short paragraph in a form. I mean, it's not a long  
9 form. It was short.

10          THE COURT: But the thing about that case  
11 is -- it's not that I disagree with you. It's just that  
12 it doesn't implicate the Eleventh Amendment which is the  
13 elephant in the room for any kind of injunctive relief,  
14 especially the injunctive relief you want. I know it  
15 was my idea when I floated it in the certification order  
16 and I really thought the state should agree to it, but  
17 the fact is they're right. If I'm going to order it, it  
18 can't violate the Eleventh Amendment, and that's what  
19 you want me to order, right? So Guare doesn't help.

20          MR. CHRISTIE: Well, Guare does help because  
21 it is a violation -- Guare said in that case, because it  
22 was brought in state court, a violation of the state  
23 constitution.

24          The same issue is in front of you with an  
25 allegation of a violation of the Federal Constitution.

1 If the same problem is in front of you that was in front  
2 of Guare and it's a violation of the Federal  
3 Constitution, your Eleventh Amendment problem doesn't  
4 exist.

5 THE COURT: That's true. Okay. That's true.

6 MR. CHRISTIE: So what we have here is a  
7 record of confusion, and a record of confusion brought  
8 on not simply by the enactment of the statute itself in  
9 the failure to address 259:88 and other statutes, but we  
10 believe a record of confusion caused by the  
11 implementation of the statute that just compounds the  
12 issue.

13 And I just want to crystalize what we're  
14 asking for here is that --

15 THE COURT: I know what you're asking for. It  
16 was my idea, remember?

17 MR. CHRISTIE: I do, but it is an incredibly  
18 narrow form of relief.

19 THE COURT: That's true.

20 MR. CHRISTIE: In my view, based upon this  
21 evidence we could be asking to strike down the entire  
22 statutory scheme.

23 THE COURT: Well, you are. You are asking  
24 that.

25 MR. CHRISTIE: No.

1           THE COURT: You're not asking it for  
2     injunctive relief.

3           MR. CHRISTIE: Not today, that day will come,  
4     but we're asking you very simply for them to do  
5     something -- to not do something, as you've elicited  
6     from them, they've never done, which is --

7           THE COURT: Well, he doesn't know that. The  
8     interesting thing about all this, though, is that what  
9     you're requesting, right, again it was my idea, I'm not  
10    blaming you --

11          MR. CHRISTIE: That's why it's such a good  
12    idea, Judge.

13          THE COURT: -- but it was not only a temporary  
14    prohibition on use of this voter registration  
15    information for these prosecutions, but also you want a  
16    clarification about that, you want that to be  
17    publicized, and it just seems to me -- I don't want to  
18    throw another curve ball on this, but that seems to be  
19    the type of announcement that, you know, the  
20    admissibility of evidence in a certain proceeding about  
21    derived from a -- that seems to be the type of thing  
22    that might confuse voters as much as anything else we've  
23    talked about today.

24          MR. CHRISTIE: In the SB3 case that was in  
25    state court a couple years ago, Judge Temple did

1 something very similar. It was a TRO hearing just  
2 before an election and he -- there was a lot of  
3 confusion here, I'm going to strike down -- I'm going to  
4 stay the criminal penalties. So the state can tell  
5 people, listen, you're not going to be criminally  
6 prosecuted if you register and you shouldn't have done  
7 it this way and it allows the process to go forward.

8 What this process here would do, and that was  
9 in the state court, and that law is still in effect in  
10 the state court, we're having a PI final hearing on the  
11 merits in that case in December, and the state in that  
12 case has agreed that the judge doesn't have to rule  
13 before the election. That can all stay in place to give  
14 the judge time.

15 THE COURT: Yeah.

16 MR. CHRISTIE: So we're asking for you to do  
17 something even more --

18 THE COURT: That's no longer with Judge  
19 Temple, right?

20 MR. CHRISTIE: It's now in front of Judge  
21 Anderson.

22 THE COURT: Everybody is willing to work with  
23 Judge Anderson and they're not willing to work with me,  
24 I don't get it. My great proposal, it would have made  
25 things so much easier for certification. Instead we're



1 doing this, which is difficult to do on a very limited  
2 record, but okay.

3 MR. CHRISTIE: But what we're asking you to do  
4 here is even narrower than what the state court was able  
5 to do with the other statute where they said, we're  
6 going to stay the criminal penalties because that is  
7 what causes most of the confusion here. And here the  
8 Court can issue a similar even narrower order that says  
9 for the time being if someone registers to vote the  
10 state was not going to use -- cannot use that in a  
11 prosecution under state law on these issues, and if at  
12 some point in the future -- that's very narrow relief.  
13 If at some point in the future they sufficiently cure,  
14 either the supreme court clarifies or their frequently  
15 asked questions cures that, they could always come back  
16 and say, we fixed it, lift your order, and so --

17 THE COURT: But the only fix you would accept  
18 there would be that 259:88 exempts college students from  
19 these domestication requirements, right?

20 MR. CHRISTIE: Well, I think the fact that  
21 they -- it sounds like their frequently asked questions  
22 is not even going to address 259:88, if I understand it  
23 correctly, and we have no testimony on it. I don't mean  
24 to be glib, but it would have been more appropriate to  
25 hear that from Mr. Scanlan or another witness that these

1 plans were in place. But since we don't know for sure  
2 what it's going to say and it sounds like 259:88 is not  
3 going to be addressed, in our view that's not a proper  
4 cure to this problem.

5 THE COURT: First of all, I do accept Mr.  
6 Galdieri's representations.

7 MR. CHRISTIE: I do, too, but --

8 THE COURT: Is he gone?

9 MR. GALDIERI: Yes. He had to go.

10 THE COURT: Okay. Okay.

11 MR. CHRISTIE: Thank you.

12 THE COURT: Hold on a second. Let me just  
13 check my notes.

14 Sticking with 259:88 for a minute, and anybody  
15 can answer this. I'm not just trying to put Mr.  
16 Christie on the hot seat. Anybody can.

17 If I disagree with your interpretation of  
18 259:88, because reasonable minds can differ about what  
19 that means and its effect, I can't grant your injunction  
20 if I disagree with your interpretation of 259:88, right?

21 MR. CHRISTIE: I think it makes it easier for  
22 you to grant it if you agree with us.

23 THE COURT: If I agree with you.

24 MR. CHRISTIE: If you disagree, I don't think  
25 it precludes you from granting it, because it's still an

1     unresolved question and there are letters that are going  
2     out that go out to people who signed the domicile  
3     affidavit, at least up through the latest batch of  
4     letters that we have, still cite that statute. So the  
5     issue is in some documents that are going out to voters  
6     they're telling people that statute is part of the  
7     analysis, but here in the letter they're ignoring it,  
8     and so I --

9             THE COURT: Maybe I missed this evidence or  
10     maybe I'm not understanding you now. In what  
11     correspondence that's going out are they saying 259:88  
12     does have effect?

13            MR. CHRISTIE: I think we marked it as  
14     Plaintiffs' 15.

15            THE COURT: That new piece of evidence --

16            MR. CHRISTIE: Right. When it goes out and  
17     they explain the obligation to register to vote, they  
18     cite 21:6 and 259:88.

19            THE COURT: Yep.

20            MR. CHRISTIE: So that they're citing it in  
21     some circumstances and then not citing it in other  
22     circumstances I just think adds to the confusion claim,  
23     the confusion issue. And so even if we're wrong and the  
24     Court thinks that Mr. -- that the state's evidence is  
25     right on that, the fact that that evidence is still --

1 that that correspondence is still out there and that  
2 issue is unresolved as a matter of state law because  
3 it's going to go to the New Hampshire Supreme Court  
4 still would give the Court a basis to issue the relief  
5 that we're asking for at least temporarily.

6 THE COURT: All right. Give me a chance to  
7 read this before I ask you this question.

8 MR. CHRISTIE: And also the fact that, you  
9 know, we have the issue -- up until last week we had,  
10 you know, the wrong information up on the state's  
11 website telling people that domicile and residence are  
12 two different things under New Hampshire law, which is  
13 expressly wrong based upon the amendment to 1264 under  
14 their theory of statutory construction.

15 THE COURT: Yeah. What about it, that there  
16 was an incorrect interpretation there for a while until  
17 last week? So it's been corrected. How am I supposed  
18 to address past stuff that's been addressed now? What  
19 order can I make to address that?

20 MR. CHRISTIE: It's not past. It is going on  
21 now. There's a presidential election in this state on  
22 February 11. There are campaigns in this state  
23 investing exorbitant resources in trying to register  
24 people to vote in that election, and we have an  
25 affidavit in this case that they were unable to do so

1 for the past several months because of the confusion in  
2 this law.

3 THE COURT: They can have several months to do  
4 it when the law is clarified. To an extent, it's  
5 already been clarified now.

6 MR. CHRISTIE: Except that it doesn't cite --

7 THE COURT: 259:88.

8 MR. CHRISTIE: -- one of the most relevant  
9 statutes to the analysis. Nor does it cite -- I'll  
10 stop.

11 THE COURT: No, no, I wasn't trying to express  
12 limitations at all.

13 MR. CHRISTIE: Nor does it cite in the letter  
14 the fact that college students -- you know, the  
15 interpretation that you brought up earlier that's going  
16 to be one of the certified questions, I think, the  
17 statute that says a college student is domiciled in this  
18 state for voting purposes, and I'm paraphrasing the  
19 statute, there's a reasonable interpretation of that  
20 statute that none of this applies to them. It's not  
21 explained in the letter. It's not explained in the  
22 letter that goes to Betsy McClain, who is administering  
23 the election in one of the two biggest college towns in  
24 the state.

25 THE COURT: Yep. All right. Let me say this,

1 and I'm going to ask one more question. I think Mr.  
2 Klementowicz is going to want a crack at this one.

3 Let me just say to you, I hope I haven't given  
4 you the impression that you need to rush or cut off or  
5 truncate your arguments.

6 MR. CHRISTIE: You have not.

7 THE COURT: Okay. You practice here a lot of  
8 time. There are a lot of lawyers that walk into this  
9 courtroom and waste my time, but you have never done  
10 that. So when you're talking, believe me, I'm  
11 listening.

12 MR. CHRISTIE: I understand. Thank you.

13 THE COURT: Mr. Klementowicz, let me ask you a  
14 question. So does Anderson-Burdick mean in your opinion  
15 that any incorrect interpretation of state election law  
16 is actionable in federal court?

17 MR. KLEMENTOWICZ: I think any inaccurate  
18 dissemination of state election law that causes  
19 confusion is actionable, yes.

20 THE COURT: All right. I would ask you if you  
21 have authority for that, but I think you would point me  
22 to the same case as the Florida case.

23 That case in Florida, though, that didn't seem  
24 like a -- I skimmed it during the break and it seemed  
25 like -- it seemed like the court in Florida, though,

1 thought for sure that the state -- that that  
2 interpretation, that representation about the law was  
3 clearly unconstitutional, and there's no Eleventh  
4 Amendment problem there, unless I'm misinterpreting that  
5 case. It seemed to be not the case that -- it didn't  
6 seem to be on sort of four legs with this. But you're  
7 telling me then if state election law has been misstated  
8 by a state in a way that would have caused confusion,  
9 actionable in federal court?

10 MR. KLEMENTOWICZ: Yeah, and I know it's a  
11 state court case, but I really do think that the  
12 analysis from Guare where they say -- basically the  
13 analysis was there's inaccurate language about the  
14 obligations on the registration form. The trial court  
15 found that could cause people not to vote. Therefore,  
16 it's a violation of their right to vote. End of the  
17 analysis. And if that's the case here, that gets you  
18 well within the Eleventh Amendment.

19 I just wanted to respond briefly to a couple  
20 of points that were made and then touch on the FAQs that  
21 we've just heard about.

22 First, the defendants minimized the magnitude  
23 of the number of people impacted by Dr. Herron, who  
24 finds, to be clear, that there were over 8,000 people  
25 who used out-of-state ID at some point in their voting

1 process in the 2016 general election. That 2016 general  
2 election had a senate race in New Hampshire decided by  
3 1100 votes, had a presidential election decided by about  
4 3,000 votes. These are significant numbers of people.  
5 So it's not a miniscule problem.

6 I just wanted to touch briefly on the FAQ that  
7 the state has raised and why that can't provide a basis  
8 for this Court to decline to issue an order. First of  
9 all, we don't know what it's going to say. The state  
10 can't represent to you that it's going to address  
11 259:88. They can't represent to you that it's going to  
12 address 654:1-1a, the student domicile statute that you  
13 were talking about. They haven't told us when it's  
14 going to happen, we don't know what it's going to say,  
15 and it's coming so late in the process.

16 There is an election scheduled for February  
17 11th, I think it's going to be, 2020. That's in like  
18 two months. The state has known about the confusion  
19 from Betsy McClain, she testified, at least since the  
20 fall of 2017 when the bill was introduced. She's given  
21 them multiple opportunities to provide information about  
22 what the law does and doesn't do.

23 The express confusion over these statutes has  
24 been in our complaint since we sought to amend prior to  
25 the deadline of October 14th. The state has known that



1 we were seeking preliminary relief at least since our  
2 response to the Court's order on October 19, 2019.  
3 That's over a month and we haven't seen the FAQ yet. We  
4 didn't have testimony about it. We don't know what it's  
5 going to be. They've had this time --

6 THE COURT: Well, had you heard about it  
7 before today?

8 MR. KLEMENTOWICZ: No.

9 THE COURT: Okay.

10 MR. KLEMENTOWICZ: No. So maybe they could  
11 have addressed confusion earlier, but we're running out  
12 of time. There's a trial scheduled for January. This  
13 is a month that had the FAQ been released, then maybe it  
14 would have been fine, you know, could have obviated the  
15 need for all of this, we wouldn't have spent a month  
16 litigating this, we wouldn't have put off the  
17 certification motion for a month, putting this January  
18 trial date in serious jeopardy with the certification.

19 THE COURT: I could have done a certification  
20 motion anytime I wanted. Nobody has put it off. If  
21 you're under the impression that you put it off, let me  
22 disabuse you. You didn't put it off. I put it off  
23 because I wanted more information, and I've gotten more  
24 information. It's going to be a better certification  
25 now because now it's all about the new statute, right?

1 And maybe it's a state constitutional argument and the  
2 like, but I'm skeptical about the idea that -- about two  
3 ideas.

4 I think -- I'm having difficulty with the idea  
5 that the remedy for this confusion is the order -- the  
6 order enjoining use of evidence in a criminal case.  
7 That's No. 1.

8 Number two, I think there's been some  
9 clarification now, I'm not sure how complete it needs to  
10 be, but -- well, I'm also struggling with this -- when  
11 was this lawsuit brought?

12 MR. KLEMENTOWICZ: February 13, 2019.

13 THE COURT: What took it so long to get  
14 traction? We haven't started really getting at it until  
15 a couple months ago.

16 MR. KLEMENTOWICZ: Well, the defendants moved  
17 to dismiss and there was a hearing --

18 THE COURT: I guess I took too long to decide  
19 that, is that the issue? Because I don't think I sat on  
20 it for too long, but it seemed like nothing happened for  
21 a while.

22 MR. KLEMENTOWICZ: So the motion to dismiss,  
23 you orally denied it at the hearing on July 30th. So  
24 it's been since then August, September, October, and  
25 we've been doing --

1 THE COURT: When was it filed; do you  
2 remember?

3 MR. KLEMENTOWICZ: February 13th.

4 THE COURT: Yeah. It should have been decided  
5 sooner. All right.

6 MR. KLEMENTOWICZ: But so all this to say, I  
7 think, we can't rely on the FAQs. If that had been a  
8 serious plan, it would have happened before we all had  
9 to come and spend a month getting ready for this and  
10 coming into federal court on an emergency preliminary  
11 injunction.

12 THE COURT: Give me a moment.

13 Mr. Bissonnette, if you wanted to say  
14 something, go ahead.

15 MR. BISSONNETTE: I'm just consulting with  
16 co-counsel, your Honor.

17 MR. KLEMENTOWICZ: I have one last point just  
18 about the 259:88. The declaration of Mary Dineen, which  
19 is document No. 73-6, paragraph 16, she says: I don't  
20 know if I need to get a New Hampshire driver's license  
21 or register my mother's car that I drive in New  
22 Hampshire because I don't understand the requirements  
23 under 1264 or if the New Hampshire Department of Motor  
24 Vehicle law applies to me because I maintain my  
25 residence in North Carolina for motor vehicle and

1 insurance purposes.

2 It doesn't explicitly say 259:88, but I think  
3 that's pretty clear and she's filing one of the 1Ls.

4 THE COURT: Okay. You're countering my point  
5 that we don't have anybody raising 259:88.

6 MR. KLEMENTOWICZ: Right. I am.

7 MR. BISSONNETTE: Your Honor, I did have one  
8 point in response to a comment that you just made.

9 THE COURT: Go ahead.

10 MR. BISSONNETTE: So you've referenced twice,  
11 this is a question for the Court, an issue about a state  
12 constitutional question you would certify, and I can  
13 just say at the outset I'm not quite sure what that  
14 means.

15 There isn't a state constitutional claim  
16 raised in this case supplemental to our federal claim.  
17 Certainly I think we agree with the fundamental premise  
18 that state statutory law questions that may need to be  
19 resolved to address the federal constitutional claim,  
20 perfectly appropriate for certification.

21 THE COURT: Oh, yeah.

22 MR. BISSONNETTE: But I wanted to get some  
23 clarity on what state constitutional claim issue you  
24 were thinking about raising because --

25 THE COURT: I can't remember now as I read

1 this so don't concern yourself.

2 Okay. Wait a minute, though. Okay. I have a  
3 motion to dismiss here in May. Didn't you say February  
4 a minute ago?

5 MR. KLEMENTOWICZ: The complaint was filed in  
6 February.

7 THE COURT: The motion to dismiss was filed in  
8 May, and I decided it in July.

9 MR. KLEMENTOWICZ: Yeah.

10 THE COURT: I didn't take too long to decide  
11 that.

12 MR. KLEMENTOWICZ: We're not suggesting  
13 anything of the sort, your Honor.

14 THE COURT: Don't mind me. Go ahead.

15 MR. GALDIERI: Your Honor, just a few things.

16 The November 7, 2019, letter, that analysis is  
17 consistent with the statutory construction analysis that  
18 we have in our papers.

19 THE COURT: That's true.

20 MR. GALDIERI: I didn't hear -- and it's been  
21 a long day and maybe it was said, but I didn't hear  
22 Clerk McClain say and I don't read Ann Shump's  
23 declaration to say, although the letter came out after  
24 Ann Shump's declaration, saying that we need RSA 259:A  
25 in this letter. That's what I need for clarification.

1 I hear Clerk McClain saying, we need something  
2 like a series of FAQs. And then I hear the plaintiffs  
3 saying, well, that's not going to be any good because  
4 you don't agree with our legal position, so it's going  
5 to just confuse people and make matters worse.

6 And it highlights the problem of  
7 individualized subjective confusion. Different people  
8 are potentially confused about different things. We  
9 could put more citations in this letter, but that may  
10 confuse more people. People may not understand what  
11 that means.

12 THE COURT: Sure.

13 MR. GALDIERI: And you have the added issue  
14 that we talk about also, the licensing statute, RSA  
15 263:35. It says within 60 days of establishing a bona  
16 fide residency, a nonresident has to get a licence.

17 That statute doesn't use the word resident in  
18 it.

19 So when you start to try to make all these  
20 links and you're going to load this letter with various  
21 statutes and maybe you're going to explain it in detail,  
22 maybe you're not, you're going to run the same risk that  
23 you're going to confuse more people by doing that. But  
24 if there's a certain level of statutory citation that  
25 would help dissipate confusion, we could add it to the

1 letter or we could add it to something that would do  
2 that.

3 It's difficult to get a grip on what many  
4 different people think is confusing all at one time and  
5 supply --

6 THE COURT: I certainly don't think statutory  
7 citations make things less confusing for lay people  
8 generally. Just short declarative sentences that  
9 explain things, they generally do the trick. That may  
10 or may not be possible with 259:88. Are you  
11 representing that you're going to add something about  
12 that to this letter anytime soon?

13 MR. GALDIERI: I'm not representing that we  
14 would add it. I wouldn't say that that's out of the  
15 realm of possibility that we couldn't put the citations  
16 in that lead to these conclusions.

17 THE COURT: Let me ask you this, though. I  
18 have to ask this. I mean, like for example, why is it  
19 drip, drip, drip of information to the clerk in Hanover?  
20 Why is it drip, drip of information to me in this  
21 lawsuit? Like why aren't these things just clearly  
22 represented? There have been times in this lawsuit  
23 where I've asked you questions -- today has, frankly,  
24 been a breath of fresh air. You have very succinct,  
25 clear answers to all these questions I have. But in

1 prior hearings it's always been sort of, well, we're not  
2 sure, well, we don't know, and that's how it was with  
3 the clerk. I'm trying to understand for motivations  
4 other than political, okay, why things have been this  
5 way, why has this information been so slow to sort of  
6 crystalize and be clearly presented to the public?

7 MR. GALDIERI: Well, your Honor, I think, for  
8 example, when the lawsuit began everyone was operating  
9 under the impression that we all knew how the law worked  
10 and that it worked this way. That was the plaintiffs'  
11 position. That was their counsel's position in the New  
12 Hampshire Supreme Court, and that's kind of how it sort  
13 of arises here.

14 And then slowly over time -- not slowly  
15 because this lawsuit's been moving quickly, but as this  
16 lawsuit has been progressing, we start to have very  
17 public statements about this lawsuit and things of  
18 confusion and things that start arising. And, you know,  
19 the state is not necessarily a swift machine, but it  
20 moves, and it's been trying to get back and address this  
21 and it involves multiple departments and agencies and  
22 impacts different facets of state government. So it  
23 takes a little time to do that.

24 THE COURT: I'll admit you're right, when the  
25 lawsuit started, everybody agreed about what the law



1 meant, and one side said that violates the Constitution,  
2 it's a burden, this domestication fee structure, and the  
3 other side said it didn't.

4 The Court's the one that kind of injected  
5 these statutory interpretation questions in, and I plead  
6 I'm guilty, but I'm not just talking about that. I'm  
7 talking about just questions about, you know, what does  
8 this require.

9 And, you know, the clerk seemed to have to  
10 pull teeth out of the Secretary of State's Office and  
11 get snarky letters. Yeah, I'm saying they're snarky.  
12 Maybe there's a relationship I don't know about, but it  
13 sort of surprises me to read that.

14 Can you explain that at all? Not the  
15 snarkiness. That's not for you to worry about, or even  
16 for me, but the sort of slow drip of information, what  
17 seemed to be the reluctance to just say things in  
18 English in very clear terms. Do you understand what I'm  
19 asking?

20 MR. GALDIERI: Yes. I believe the complexity  
21 comes in because somebody poses a question to somebody  
22 within the Secretary of State's Office about an issue  
23 that's not necessarily within the jurisdiction of the  
24 Secretary of State. The Secretary of State gives  
25 information which is the typical information they give,

1     which Clerk McClain admitted she doesn't advise people  
2     on all of the consequences of registering to vote  
3     because doing that can be problematic. You don't know  
4     all the answers. Somebody comes in, if I do this, do I  
5     lose my health insurance, do I lose my scholarship, do I  
6     have to pay any taxes here or anything, and they begin  
7     to encounter all sorts of problems, and that may be  
8     problematic for them. It may be problematic for the  
9     Secretary of State's Office.

10           THE COURT: I read you, yeah.

11           MR. GALDIERI: So their general position is  
12     not to do that, and now we're developing an area where  
13     maybe, and maybe the plaintiffs are even saying this,  
14     maybe this is an area we should recede from that and we  
15     should reevaluate that, and I think that's been an  
16     evolution.

17           THE COURT: I think I read you here that when  
18     the Secretary of State is getting these questions from a  
19     clerk that have ramifications for DMV and safety and law  
20     enforcement, for lack of a better way of saying it, they  
21     don't want to say the wrong thing, right?

22           MR. GALDIERI: Correct.

23           THE COURT: That's actually a straight answer.  
24     I appreciate it. It makes sense, too.

25           I've got what I need. Do you want to say

1 more?

2 MR. CHRISTIE: Can I say one more thing?

3 THE COURT: Yes. I just told you I would  
4 listen to you no matter what you said, so I have to  
5 listen to you now.

6 MR. CHRISTIE: I'm going to remember that.

7 THE COURT: I should never have said that.

8 MR. CHRISTIE: One final thing. I actually  
9 meant to say this earlier.

10 Paragraph 4 of the November 7th letter.

11 THE COURT: Yeah, I'm looking at it right now.

12 MR. CHRISTIE: That's what Mr. Scanlan cited  
13 to as the main clarification. And it states, and I  
14 won't read the whole thing into the record, but under  
15 the motor vehicle code an individual has 60 days upon  
16 establishing residence to obtain a New Hampshire  
17 driver's license if they drive in the state and to  
18 register a vehicle if they own a vehicle in this state.  
19 That letter could very well have stated: Except that  
20 that person shall be deemed --

21 THE COURT: Shall not be deemed a resident if  
22 that person --

23 MR. CHRISTIE: Claims a residence in another  
24 state, and they don't say it. That's the confusion.

25 THE COURT: I get it. Okay. Look, thank you.

1 Let me just say this to all of you, and we'll reconvene  
2 if necessary in the jury room so we can talk about  
3 discovery, and it will only take us five or ten minutes,  
4 but I just want to say this. I very much appreciate the  
5 way you've conducted yourselves today, especially, you  
6 know, there's some younger lawyers here. They were  
7 allowed to do important things in an important case.  
8 That's the way it should be done and both sides did it.  
9 It's very much appreciated by the Court, and also the  
10 arguments by the old grizzled hands.

11 That's important and not enough people do it.  
12 Not enough civil litigants do it. So thanks for doing  
13 that.

14 We're in recess.

15 (Conclusion of hearing at 4:30 p.m.)  
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## C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that  
the foregoing transcript is a true and accurate  
transcription of the within proceedings, to the best of  
my knowledge, skill, ability and belief.

Submitted: 12-4-19

/s/ Susan M. Bateman  
SUSAN M. BATEMAN, RPR, CRR